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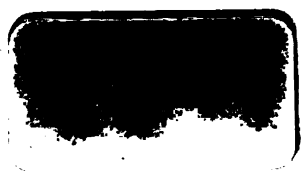
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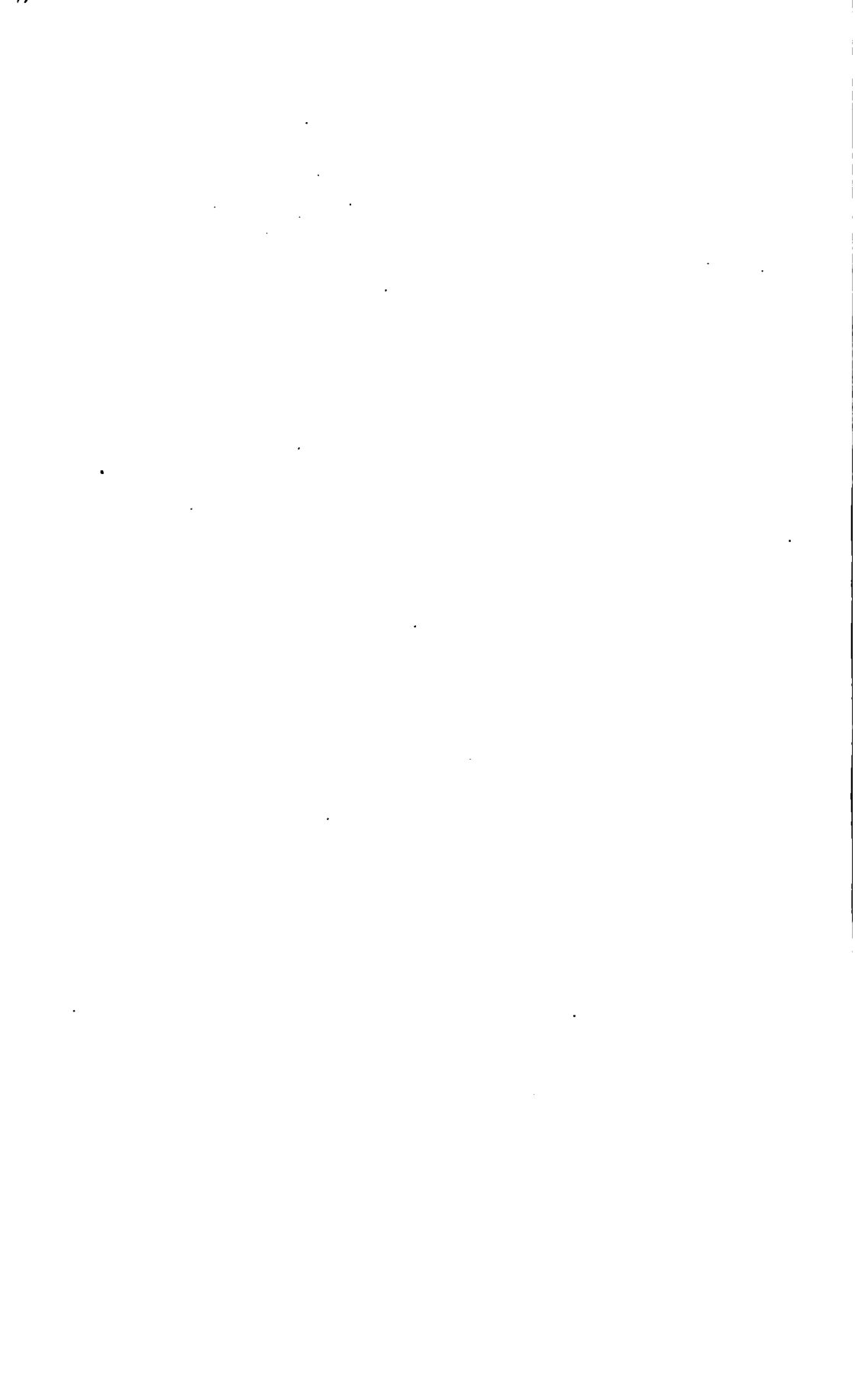
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REPORTS
OF
ACTIONS TRIED

IN THE

King's
[Queen's] Bench Division of the
Just. High Court of Justice.

FROM MICHAELMAS SITTINGS, 1882, TO THE END OF
TRINITY SITTINGS, 1885.

BY

MICHAEL CABABÉ,

OF THE INNER TEMPLE;

AND

CHARLES GREGSON ELLIS,

OF LINCOLN'S INN,

BARRISTERS-AT-LAW.

VOL. I.

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PREFACE.

WE feel that an apology may be due for the resuscitation of "Nisi Prius" Reports at the present day, after a lapse of some twenty years, but we have thought, that of the thousand or twelve hundred cases, annually tried in London, some eight or ten per cent. afforded information of value, which would otherwise be lost.

We have endeavoured throughout to report only cases in which there was a real point, however small; to eliminate always matter immaterial for the determination of such points, and to state material facts as concisely as is consistent with clearness and accuracy. The number of cases commenced and discarded has accordingly been very great; the difficulty of selection may have led us to report some which might have been omitted, and the task of reducing those ultimately selected into a fitting shape has been one of considerable difficulty.

We have been in doubt how to deal, if at all, with judgments of Judges sitting without a jury, or delivered on "further consideration." "Nisi Prius," properly so called, no longer exists, and trials by Judges alone and further considerations have become very numerous, and under the new Procedure will probably become more so. There certainly seems no reason why, if the direction to a jury, or the grounds of a non-suit are worth recording, the judgment of a Judge "sitting without a jury," or a

judgment pronounced upon the facts as found by a jury, should be passed over. We have therefore thought it best—though this has somewhat altered the character of the book from that of previous *Nisi Prius Reports*—not to exclude cases so dealt with, taking care, however, as far as possible not to trench upon ground already occupied.

We have, where it appeared to us useful to do so, endeavoured to direct attention to the law bearing on the points decided, by adding notes and references to cases.

We cannot expect that the work is without its shortcomings, but we hope that these may not be so serious as to impair any utility which it may otherwise possess.

M. C.

C. G. E.

6, KING'S BENCH WALK, TEMPLE,
November, 1885.

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In *Scarlett v. Hanson* (p. 53), the Court of Appeal affirmed the judgment of MANISTY, J.

In *Coombs v. Cook* (p. 75), the Court of Appeal affirmed the judgment of HUDDLESTON, B.

In *Alcock v. Leewoo* (p. 98), the Court of Appeal affirmed the decision of the Divisional Court, refusing a new trial.

In *Pocock v. Gilham* (p. 104), the Court of Appeal affirmed the judgment of MATHEW, J.

In *Watkin v. Newcomen* (p. 113), the Court of Appeal affirmed the judgment of DAY, J.

In *Myers v. Marsh* (p. 116), the Divisional Court (COLERIDGE, C.J., and MATHEW, J.), granted a new trial on the ground of misdirection, holding that the measure of damages in such a case is the full value of the goods seized.

In *Cramer v. Giles* (p. 151), the Court of Appeal affirmed the judgment of LOPES, J.

In *Parnell v. Stedman* (p. 153), the Court of Appeal affirmed the direction of CAVE, J., and refused to grant a new trial.

In *Robinson v. Tucker* (p. 173), the Court of Appeal affirmed the judgment of WILLIAMS, J.

In *White v. Baxter* (p. 199), the Court of Appeal reversed the judgment of WILLIAMS, J., and ordered judgment to be entered for the plaintiff upon the jury's verdict.

In *Martin v. Tritton* (p. 226), the Court of Appeal affirmed the judgment of LOPES, J.

In *Wheeler v. United Telephone Company* (p. 242), the Court of Appeal reversed the judgment of WILLIAMS, J., and followed their own judgment in *Goutard v. Carr*. See L. R. 13 Q. B. D. 597.

In *Joseph v. Webb*, *Joseph v. Lyons*, *Joseph v. Pidcock*, and *Joseph v. Jones* (p. 262), the Court of Appeal reversed the judgment of HUDDLESTON, B., so far as the after-acquired property was concerned, and held that the plaintiff had no right to it as against the defendants.

In *Elliott v. Dean* (p. 283), the Divisional Court affirmed the judgment of SMITH, J.

In *The Société Générale de Paris v. The Tramways Union Company and others* (p. 296), the Court of Appeal reversed the judgment of LOPES, J.

In *Groves, McLean v. Volkart Brothers* (p. 309), the Court of Appeal affirmed the judgment of LOPES, J.

In *Heyworth v. Mayor, etc., of London* (p. 312), the Court of Appeal affirmed the judgment of HAWKINS, J.

In *Edmunds v. Wallingford* (p. 334), the Court of Appeal affirmed the judgment of HUDDLESTON, B.

In *Guibert Borquis v. Nugent* (p. 337), the Court of Appeal affirmed the judgment of DENMAN, J.

In *Jupp v. Powell* (p. 349), the Court of Appeal affirmed the judgment of MATHEW, J.

In *Ehwell v. Jackson* (p. 362), the Court of Appeal affirmed the judgment of DENMAN, J.

In *Hermann v. Jeuchner* (p. 364), the Court of Appeal reversed the judgment of STEPHEN, J.

In *The Gas Light, etc., Company v. Vestry of St. Mary Abbots, Kensington* (p. 368), the Court of Appeal affirmed the judgment of FIELD, J.

In *Huggall v. McKean* (p. 391), the Court of Appeal affirmed the judgment of WILLS, J.

In *Bissell v. Fox* (p. 395), the Court of Appeal substantially affirmed the judgment of DENMAN, J.

In *Inderwick v. Leech* (p. 412), the direction of LOPES, J., was upheld in the Divisional Court and in the Court of Appeal.

In *Herman v. The Royal Exchange Insurance Company* (p. 413), the Court of Appeal affirmed the judgment of HUDDLESTON, B.

In *Reg. v. The Charnwood Forest Railway Company* (p. 419), the Court of Appeal affirmed the judgment of DENMAN, J.

In *Scott v. The Clifton School Board* (p. 435), the Court of Appeal affirmed the judgment of MATHEW, J.

In *Attorney-General v. Bradlaugh* (p. 440), the direction of LORD COLERIDGE, L.C.J., was upheld in the Divisional Court and in the Court of Appeal.

With regard to subsequent cases reported in this volume, subscribers desirous of obtaining information as to any subsequent proceedings in such cases in the Court of Appeal should consult the copies of the "Weekly Notes," in and after November, 1885, in which are published weekly the names of the cases which have come before the Courts of Appeal in each week, with the result of the appeal in each case.

CORRIGENDA AND ADDENDA.

Page 150, 8 lines from bottom of page, for "diction" read "dictum."

„ 152, 2 lines from bottom of page, add after "seizure," "and subsequent withdrawal."

„ 159, 7 lines from top of page, for "claim" read "case."

„ „ last line, for "Lumly," read "Lumley."

„ 171, 13 lines from bottom of page, for "1,000l." read "100l."

„ 200, last line of sidenote, for "or" read "for."

„ 201, 1st line, for "pleading" read "pleadings."

„ 211, 6 lines from top of page, for "Mitchell" read "Michell."

„ 214, 11 lines from end of case, omit word "under."

Pages 238 and 240, add at end of case "Ex relatione M. Lush."

Page 241, sidenote, 3 lines from foot of column, for "damage" read "demurrage."

„ 242, 1st line of case, "Wheeler v. United Telephone Company," add at commencement of first paragraph "WILLIAMS, J."

„ 243, 20 lines from top of page, for "lease" read "leave."

„ 257, 5 lines from foot of page, for "piece" read "price."

„ 263, 19 lines from top of page, sentence beginning "Manning was to find a sum of 1,000l. down," read after "500l.," "on the 15th of January, 1881, and 15th of May, 1881. The stock and goodwill, &c."

„ 264, 15 lines from top of page, omit "that" before "the bill of sale."

„ 272, 3rd line of case "Brunsdon v. Local Board of Staines," for "defendant" read "defendants."



ACTIONS TRIED
IN THE
QUEEN'S BENCH DIVISION OF THE
HIGH COURT OF JUSTICE,
SINCE DECEMBER, 1882.

[GUILDHALL.]

CAVE, J., and a S.J.

TAMVACO & Co. v. TIMOTHY and GREEN.
UNION LIGHTERAGE COMPANY, *Third Parties*.

1882.
December.

THIS was an action to recover damages for injury to rice while in transit from the ship *Eurydice* to the defendants' wharf.

The plaintiffs were merchants in London, and in August, 1881, they employed the defendants to unload and warehouse a cargo of rice from the *Eurydice* at the quay rate of 8s. 4d. a ton.

The question whether the liability of a common carrier has been undertaken in a particular case is one of fact and not of law.

The defendants, who were wharfingers on the Thames, had a quay abutting on the river, and behind the wharf a dock, which was dry at low water.

The defendants employed the Union Lighterage Company to convey the rice from the *Eurydice* to their dock.

The *Ironmaster*, one of the barges employed in the discharge of the cargo, and laden with 1612 bags of rice, stuck in the mud in the defendants' dock, and at the rise of the tide the water flowed over it, and the rice was injured.

Butt, Q.C., and *Barnes* for the plaintiffs.

Sir F. Herschell, S.-G.; and *Reginald Browne* for the defendants.

Tyrrel Paine for the Union Lighterage Company.

Butt, Q.C., for the plaintiffs, contended, first, that the defendants were lightermen, and as such responsible as

1882.
 TAMVACO & CO. *Liver Alkali Co. v. Johnson*, L. R. 7 Ex. 267; L. R. 9 Ex. 338, Ex. Ch.; *Nugent v. Smith*, 1 C. P. D. 423. Secondly, that in any event the defendants were liable for negligence by reason of the depth and condition of the mud in their dock.

v.
 TIMOTHY AND
 GREEN.

Sir F. Herschell, for the defendants, contended that the question whether or not the defendants undertook the liability of common carriers was one of law. That as the defendants were wharfingers, and made one common charge for carrying and warehousing, the carrying was only accessory to the warehousing; that they agreed to warehouse only, and to carry as incidental thereto; that therefore, on these facts in law there was no obligation of common carriers.

THE LEARNED JUDGE held it was a question of fact, whether it could be inferred from the arrangement that the defendants were common carriers, and that the question was, what was the agreement between the parties, and did the defendants in fact undertake the liability of common carriers?

Evidence was then given on behalf of the defendants that the charge of 3s. 4d. was made by them only in respect of the warehousing of the goods, and that the lighterage services were rendered gratuitously, to enable them to compete with the other dock companies where no lighterage was required.

On the question of negligence the evidence was conflicting.

CAVE, J.—A common carrier is a person who professes to carry for whosoever is willing to employ him, and is responsible for any damage to the goods in his possession though guilty of no negligence, unless such damage is caused by certain excepted things. In this case the defendants have undertaken to do several things for one lump sum, and they cannot distinguish between such several things, and get rid of their liability by saying they do one thing for payment, and the other for nothing. As regards the question of negligence; it is negligence, if a person knowing of danger which may affect goods intrusted to him, and having the means of guarding against such danger, yet exposes the goods to it without taking reasonable precautions to ensure their safety. The learned Judge left the following questions to the jury.

1. Was it understood between the plaintiffs and the defendants when the agreement was made as to these

goods that the defendants should undertake the liability of common carriers?

1882.

TAMVACO & Co.

2. Were the defendants by themselves or their servants, or by the servants of the Union Lighterage Co., guilty of negligence in respect of the landing or carrying of the rice?

v.
TIMOTHY AND
GREEN.

The jury answered both questions in the affirmative.

Judgment for the Plaintiffs.

Walton, Bubb & Walton.

Gush & Phillips.

J. A. & H. E. Farnfield.

See *Maving v. Todd*, 1 Stark. 92; *Sideways v. Todd*, 2 Stark. 400.

[GUILDHALL]

LOPES, J., and a S. J.

WILDY v. STEPHENSON.

1882.

December 11 & 12.

THIS was an action brought by a London stockbroker and member of the London Stock Exchange against a Liverpool stockbroker, to recover the price of shares bought by the plaintiff for the defendant, which the latter had failed to take up. The plaintiff's claim was admitted, but the defendant counterclaimed for the price of shares which he had instructed the plaintiff to sell for him, alleging that the name of the principal dealt with was not inserted in the advice notes of the sales rendered by the plaintiff to the defendant, and that (1) by the course of dealing during some years between them, and also by express agreement; * (2) by the custom of the London Stock Exchange, the plaintiff was personally liable to him in respect of the shares where the name of the principal was not disclosed.

Quære whether a custom exists on the London Stock Exchange that a broker not disclosing the name of the principal dealt with renders himself personally liable?

* The jury found that by the course of business between the parties, and by express agreement between them, the plaintiff was

personally liable, and it is not deemed necessary to report the case further on this head.

1882.

WILDY
v.
STEPHENSON.

The existence of this custom the plaintiff denied.

McIntyre, Q.C., and Horne Payne for the plaintiff.

Charles Russell, Q.C., Murphy, Q.C., and Henn Collins
for the defendant.

To prove the custom, the defendant called several brokers, members of the London Stock Exchange. These witnesses all, with one exception, deposed to its existence, although two or three of them admitted that there was a difference of opinion among the members of the Stock Exchange as to the legal liability of the broker in such cases. They stated that by disclosing the name of the principal the broker rid himself of liability, and that several brokers always disclosed the name.

The plaintiff called as witnesses several brokers, members of the Stock Exchange, to prove that there was no such custom. These witnesses deposed to the fact of there being both a difference of practice, and also a difference of opinion, as to the legal liability, when the principal's name was not disclosed. One witness (a late chairman of the Stock Exchange Committee) admitted that of recent years the country brokers had begun to deal directly with the London jobbers on the Stock Exchange, and that consequently, when they dealt with the London brokers, they expected the latter to hold themselves personally liable. He also admitted that on one occasion, when his principal's name had not been disclosed, he had, on such principal's failure, paid the loss; and that, on another similar occasion, he had shared it with his client. Only one of the plaintiff's witnesses deposed to a case (and he only to one case) in which he had, under such circumstances, refused to pay the loss incurred by the principal's default.

It appeared from the evidence of both sets of witnesses that there was a great variety of practice as to disclosing or not disclosing, the name of the principal in the advice notes.

LOPES, J., in directing the jury, told them that the alleged custom, to be binding on the plaintiff, must be, not some practice in this or that office, but an universal usage on the Stock Exchange, reasonable and certain, and so acquiesced in that all persons dealing with members of the Stock Exchange must know, or must be taken to know, it. The jury were

unable to agree as to the existence or non-existence of the custom.*

1882.

Morley & Shirreff.

R. W. Marsland.

WILDY
v.
STEPHENSON.

As to the customs and regulations of the London Stock Exchange, see *Grissell v. Bristolove*, L. R. 3 C. P. 112; S. C. in Ex. Ch. L. R. 4 C. P. 36; *Maxted v. Paine*, L. R. 4 Ex. 203; S. C. in Ex. Ch. L. R. 6 Ex. 132.

As to the necessity of proof of a custom to render a broker liable as a principal, see *Southwell v. Bowditch*, L. R. 1 C. P. D. 100; C. A. 374.

[GUILDHALL.]

Before CAVE, J., and a C. J.

THE LONDON DISCOUNT ALLIANCE Co., LIMITED,
v. KERR AND WIFE.

1882.

December 11.

THIS was an action brought by the plaintiffs with a view of charging the separate estate of the wife in respect of certain promissory notes signed by her and her husband jointly. Evidence was given to show that Mrs. Kerr had effected two charges, which purported to bind her separate estate to the amount of the promissory notes, and on this evidence the plaintiffs' counsel asked his Lordship to direct an inquiry in chambers as to separate estate.

A charge given by a married woman upon her separate estate is sufficient evidence of the existence of separate estate to entitle a plaintiff to an enquiry.

Kemp, Q.C., and *Willey Wright* for plaintiffs.

W. Graham (with him *Hilberry* for the defendant), contended that the plaintiffs must prove the existence of separate estate which could be charged, before they were entitled to any order. He cited *Pike v. Fitzgibbon*, in 41 L. T. N. S. (reported also in L. R. 17 Ch. D. 454).

THE LEARNED JUDGE directed an inquiry at chambers as to whether at the date of the notes Mrs. Kerr had any and what

* They however intimated that 11 of their number were prepared to find that the custom had been proved.

1882.	separate estate, and in whom the same was now vested, and whether with or without power of anticipation.
THE LONDON DISCOUNT ALLIANCE CO. LIMITED r.	<i>F. G. Cordwell.</i>
KERR AND WIFE.	<i>Taylor, Hoare & Taylor.</i>

The Married Women's Property Act, 1882 (45 & 46 Vict. c. 75, sec. 1, § 2), has removed the necessity of joining the husband in any such action against a married woman in the future.

The decision in *Pike v. Fitzgibbon*, so far as it decided that a contract entered into by a married woman with intent to charge her separate estate, charged only such separate estate as she was possessed of at the time of entering into the contract, and not separate estate after-acquired, has been expressly overruled by the above-mentioned Act, Sec. 1, § 3 of which provides that: "Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and bind her separate property, unless the contrary be shown." § 4 provides that "Every contract entered into by a married woman, with respect to and to bind her separate property, shall bind not only separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." But probably it is still necessary, as in the case above reported, to give evidence that the married woman was possessed of some separate estate at the date of the contract. If, however, a married woman be possessed of or entitled to no separate estate at the date of the contract, but become so between that date and action brought; *quære*, whether the plaintiff would be entitled to charge such separate estate?

It seems difficult to contend in such a case that the after-acquired property is bound, though, perhaps, it might be considered that the presumption created by § 3 could *only* be rebutted by proof of the non-existence of a separate estate at the time of action brought.

See *Murray v. Barlee*, 3 M. & K. 209; *Owen v. Dickenson*, 1 Cr. & Ph. 487; *Pickard v. Hine*, L. R. 5 Ch. App. 274.

[GUILDHALL.]

CAVE, J., and a S. J.

1882.
December 16.

MARZETTI v. SMITH & Co.

There is a custom in the Port of London entitling steamships with general cargoes using the docks to land their cargoes on the dock quay. Section 67 of the Merchant Shipping Amendment Act, 1862, only applies where default in entry of the goods has been made by the owner.

THIS was an action brought to recover, as damages for the breach of the contract contained in a bill of lading, 102*l.* 2*s.*, the amount of certain charges paid by the plaintiff to the

London & St. Katherine's Dock Co. under the following circumstances :—

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The plaintiff was a bonded warehouseman in the City of London, and the defendants were shipowners. In the year 1881 a firm, Shaw, Finlayson & Co., of Calcutta, shipped certain teas on the *City of Edinburgh*, and other steamers of the defendants carrying general cargoes, and employed the plaintiff to take delivery of the teas in London and to warehouse them, and for this purpose they forwarded him the bills of lading. These were similar in form, and the material parts were (1.) a provision that the goods were "to be delivered from the ship's tackles (where the ship's responsibility shall cease), at the aforesaid port of London, or so near thereunto as she may safely get ;" and (2.) a provision that "The goods are to be discharged from the ship as soon as public intimation is given that she is ready to unload, and if not thereupon removed without delay by the consignor, the master or agent to be at liberty to land the same, or if necessary to discharge into hulk, lazaretto, or hired lighters at the risk and expense of the owners of the goods."

On the arrival of the steamers in the docks, the plaintiff, who had passed an entry for overside delivery at the Custom House, sent lighters to the side of the steamers for the purpose of getting delivery of the teas overside direct from the steamers into the lighters. The defendants, however, refused to deliver the teas in this manner and landed them upon the Dock quay, and the plaintiff took them away thence in vans by land, and was charged by the Dock Company the sum sought to be recovered in this action for the loading of, and delivery into, the vans. It was admitted that the plaintiff could have obtained delivery of the teas from the quay into lighters free of expense, the shipowners in this case paying the Dock Company's charges.*

Charles Russell, Q.C., and Crump for the plaintiff.

Butt, Q.C., and G. Wood Hill for the defendants.

For the plaintiff it was contended (1.) that by the express

* This was the second trial of the action. On the first trial, Baron Huddleston nonsuited the plaintiff, but the Divisional Court, consisting of Grove and Mathew, JJ., directed a new trial.

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terms of the bills of lading he was entitled to delivery from the ship's side direct into lighters; (2.) that he was entitled to the same right and also to charge the defendants with the monies in question under the Merchant Shipping Amendment Act, 1862 (25 & 26 Vict. c. 68), ss. 66 and 67.*

For the defendants it was contended (1.) That the plaintiff had no title to sue for a breach of the bill of lading contract, not being a consignee or indorsee within the meaning of the first section of the Bills of Lading Act, 1855 (18 & 19 Vict.

* *Section 66.* "The expression 'owner of goods,' shall include every person who is for the time being entitled, either as owner or agent for the owner, to the possession of the goods, subject in the case of a lien, if any, to such lien."

Section 67. "Where the owner of any goods imported in any ships from foreign parts into the United Kingdom, fails to make entry thereof, or having made entry thereof, to land the same or take delivery thereof, and to proceed therewith, with all convenient speed by the times severally hereinafter mentioned, the shipowner may make entry of, and land or unship the said goods at the times, in the manner and subject to the conditions following: (that is to say)," etc., etc.

Sub-section 5. "If at any time before the goods are landed or unshipped the owner of the goods is ready and offers to land or take delivery of the same, he shall be allowed so to do, and his entry shall in such case be preferred to any entry which may have been made by the shipowner."

Sub-section 6. "If any goods are, for the purpose of convenience in assorting the same, landed at the wharf where the ship is discharged, and the owner of the goods at the time of such landing

has made entry and is ready and offers to take delivery thereof, and to convey the same to some other wharf or warehouse, such goods shall be assorted at landing, and shall, if demanded, be delivered to the owner thereof within 24 hours after assortment; and the expense of and consequent on such landing and assortment shall be borne by the shipowner."

Sub-section 7. "If at any time before the goods are landed or unshipped the owner thereof has made entry for the landing and warehousing thereof at any particular wharf or warehouse other than that at which the ship is discharging, and has offered and been ready to take delivery thereof, and the shipowner has failed to make such delivery, and has also failed at the time of such offer to give the owner of the goods correct information of the time at which such goods can be delivered, then the shipowner shall, before landing or unshipping such goods under the power hereby given to him, give to the owner of such goods or of such wharf or warehouse as last aforesaid 24 hours' notice in writing of his readiness to deliver the goods, and shall, if he lands or unships the same without such notice, do so at his own risk and expense."

c. 111); (2.) That the charges were not recoverable, because they were monies which the plaintiff had not been compelled to pay, as he could have obtained delivery into lighters from the quay without paying them; * (3.) That there was a custom entitling general steamships unloading in the London Docks to unload their cargoes on the quay; (4.) That the Merchant Shipping Act of 1862 had no application, inasmuch as it only applied in case of default to make entry; and that even if it did apply, it was not inconsistent with the custom.

The admissibility of the evidence as to custom was objected to on the ground that it contradicted the bill of lading.

Butt, Q.C., referred to *Petrocochino v. Bott*, L. R. 9 C. P. 355.

HIS LORDSHIP admitted the evidence.

The evidence was to the effect that it was the custom for steamships carrying general cargoes, and discharging those cargoes in the London Docks, to discharge them on to the Dock quay, and not overside, direct into lighters. This was deposed to by witnesses connected with the City Line, the Castle Line, the Peninsular and Oriental Steamship Company, the British India Steamship Navigation Company, the Ocean Steamship Company, and the Liverpool, Brazil, and River Plate Steamship Company, also by the Manager of the Union Lighterage Company, and the Superintendent of the Trinity Bonded Warehouse. It was not contended that the custom extended save to steamships with general cargoes, and it was stated to have arisen owing to the convenience to all parties concerned of this mode of delivery, which effected a very great saving of time in unloading.

CAVE, J., in summing up, alluded to the fact that no merchants or other witnesses had been called on the part of the plaintiff to rebut the custom, and also said that it was material to consider the foundation of the practice, because if the practice be convenient to all or both parties, it very soon

* As the case was decided on other grounds, no ruling or decision was given as to either of these contentions: but his Lordship expressed a strong opinion that the second of them was unsound.

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hardened into a custom, far sooner than if it were inconvenient to one party, although no doubt even in the latter case it might become a custom. He left the following question to the jury :

Have the defendants proved a well-known custom or usage on the part of steamers having general cargoes coming to the port of London to discharge their cargoes upon the quays and thence to have them delivered into lighters, and not to have them delivered direct into the lighters ?

The jury found as follows :—" We find it to be a custom established by steamship owners using the docks to land upon the quays."

On this finding his Lordship ruled that the custom was not inconsistent with the bill of lading, and gave judgment for the defendants.

Elmslie, Forsyth, & Elmslie. Gellatly, Son, & Warton.

The Court of Appeal (Brett, M.R., Lindley and Fry, L.JJ.) affirmed the decision of the Divisional Court (Grove, Lopes and Mathew, JJ.), discharging a rule *nisi* for a new trial ; holding that the custom was not inconsistent with the bill of lading, and that the provisions of the Merchant Shipping Amendment Act, 1862, did not apply, as no default had been made in entry of the goods.

[GUILDHALL.]

DAY, J., and a C. J.

ROWLANDS v. DE VECCHI.

1882.

December.

Neither proof of an entry made by a deceased person in the ordinary course of business in a postage book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting,

THIS was an action to recover commission and differences on certain Stock Exchange transactions, in the course of which a question arose as to the reception in evidence of the contents of a letter from the plaintiff to the defendant, the receipt of which the defendant denied.

The boy whose duty it was to post the letter was dead, and

is sufficient evidence of postage.

the plaintiff to prove the posting of the letter sought to put in evidence the postage book, in which it was the duty of the boy in the ordinary course of his business to make an entry of all letters for postage by him on each day.

The plaintiff's counsel contended, on the authority of *Price v. The Earl of Torrington*, 1 S. L. C. 344, that this was an entry by a deceased person in the ordinary course of his business, and as such admissible to prove the posting of this letter.

HIS LORDSHIP ruled that as the postage book only contained entries of letters to be posted and not after postage, it did not assist the plaintiff.

Upon this the plaintiff's clerk proved that on the day in which the plaintiff stated that he had written the letter in question, a letter from the plaintiff to the defendant was read over to him, that a copy was taken, that the letter was placed in an envelope directed to the defendant, that it, with two or three more, was given to the deceased boy to post, that the deceased and witness left the office together, and that all these letters were then in the deceased's hand to take to the post.

It was further proved that no complaints had been received of any of the other letters having miscarried.

THE LEARNED JUDGE ruled that this was merely evidence of possession of a letter for the purpose of posting, but not sufficient proof of postage itself.

Finlay, Q.C., and *R. O. B. Lane*, for the plaintiff.

Willey Wright, for the defendant.

Linklaters.

W. Crook.

See *Pritt v. Fairclough*, 3 Camp. 305 *et notas*; *Hagedorn v. Reid*, 3 Camp. 377; *Trotter v. McLean*, 13 Ch. D. at p. 580.

[GUILDHALL.]

DAY, J.

1882.

SKINNER & Co. v. WEGUELIN EDDOWES & Co.

December 21.

An agent employing a sub-agent, though with the knowledge of the principal, is nevertheless liable to the principal for monies received by the sub agent.

THIS was an action brought by the plaintiffs, owners of the ship *Braemar Castle*, to recover from the defendants, ship and insurance brokers in London, the sum of 474*l*.

In 1879 the defendants, at the plaintiffs' request, effected for them a policy of insurance upon the *Braemar Castle*. A claim on the policy subsequently arose, and the defendants were employed by the plaintiffs to collect the sums due in respect thereof. The defendants paid over certain sums so collected to the plaintiffs as they received them, but the 474*l*. claimed in this action was collected by a M. Magniol, in Paris, who was employed by the defendants, with the plaintiffs' knowledge, to collect this money, and the defendants were unable to obtain payment of it from him.

Mellor, Q.C., and *F. Hollams*, for the plaintiffs.

Witt, for the defendants, contended that they were not responsible to the plaintiffs for this sum. That M. Magniol was employed by the defendants as a sub-agent with the plaintiff's knowledge, to collect the money, and that the defendants could not be made responsible for it until it had come into their hands. He cited *Story on Agency*, ss. 201—2—4; *Lanyon v. Blanchard*, 2 Camp. 597; *Westwood v. Bell*, 4 Camp. 849.

DAY, J.—The doctrine has always been, that if I employ an agent to do work for me, and he employs a sub-agent, the agent remains responsible to me. On the facts I am clearly of opinion that the defendants are responsible to the plaintiffs for the money received by M. Magniol. Judgment accordingly.

Hollams, Son, & Coward.

Pritchard & Co.

See *Story on Agency*, s. 231 (a), and generally; *New Zealand and Australian Land Co. v. Watson*, L. R. 7 Q. B. D. 374; *Maspons y Hermano v. Mildred*, L. R. 9 Q. B. D. 530.

[GUILDHALL.]

CAVE, J., and a C. J.

CRIPPS v. TAPPIN & Co.

1882.

December.

THE plaintiff was a timber merchant, and had supplied timber to the firm of Tappin & Co. (the only member of which at the time was Joseph Tappin), on the order of George Tappin the manager. Delivery orders were made out in favour of Tappin & Co., and bills for part of the amount were accepted in the firm's name in the handwriting of Joseph Tappin.

Where an individual has entered an appearance in an action against a firm, there must be a novation to render him liable for a debt contracted before he was a member.

The business of the firm was subsequently transferred by deed to Elizabeth Tappin, and she thereby agreed to indemnify the firm against debts due by them. The bills were dishonoured, and the writ in this action was issued against Tappin & Co., to recover the amount due on the bills in question, and the balance as for goods sold and delivered. The writ was served at the place of business of Tappin & Co., and to it Elizabeth Tappin only had entered an appearance.

Tyrrel Paine for the plaintiff.

Murphy, Q.C., and *R. Vaughan Williams* for the defendants.

The plaintiff having failed to prove that Elizabeth Tappin was a member of the firm of Tappin & Co. at the time the timber was supplied,

THE LEARNED JUDGE ruled that the mere fact that Elizabeth Tappin had undertaken to indemnify Joseph Tappin did not give the plaintiff a right against her, but that it would require a novation to render her liable in this action.

The plaintiff being unable to adduce any evidence of novation, the jury, under the direction of his Lordship, found a verdict for the defendants.

Lowless & Co.

C. F. Lawes.

See *Scarf v. Jardine*, 7 Appeal Cases, 345 ; Rules of Court, 1875, O. IX. rr. 6, 6a ; O. XII. rr. 12, 12a.

See, too, observations of James, L.J., *Ex parte Blain, re Sawers*, 12 Ch. D. at p. 533.

See, too, now, O. XVI. r. 14 of the Rules of the Supreme Court, 1883.

LOPES, J., and a C. J.

1883.

January 18.

GARDNER v. SMART.

"Walter Neve, of Luton, in the county of Bedford, solicitor," Held a sufficient description of an attesting witness within the meaning of the Bills of Sale Act, 1878.

IN this case the question was whether the description of the attesting witness to a bill of sale, as stated in the affidavit filed with the copy of the bill of sale, pursuant to sect. 10, sub-sect. 2, of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 81), was sufficient.

The description was as follows:—"I, Walter Neve, of Luton, in the County of Bedford, Solicitor."

It appeared in evidence that Luton was a town of some 25,000 inhabitants, and contained seven or eight solicitors.

A. G. McIntyre for the plaintiff.

Peile, for the defendant, referred to the observations of *Lush, J.*, in *Briggs v. Ross* (L. R. 3 Q. B. 271), as to the *prima facie* insufficiency of a similar description.

HIS LORDSHIP, in holding that the description was sufficient, said: "Neve is an uncommon name; it is not like Smith. The witness, too, was a solicitor. If I went to Luton, and inquired at the station, or at a shop, I have no doubt I should be told where Mr. Neve lived."

Wetherfield & Son.

G. Blagden.

The Bills of Sale (1878) Amendment Act, 1882 (45 & 46 Vict. c. 43), does not in any way alter the law as to the necessity of a sufficient description of the attesting witness.

STEPHEN, J., and a C. J.

LONDON AND WESTMINSTER SUPPLY ASSOCIATION LIMITED *v.* GRIFFITHS.

1883.

January 22.

THIS was an action by the plaintiffs to recover the amount of certain calls from the defendant, a shareholder in the Company. Besides raising certain issues of fraud, which the jury found against him, the defendant also raised the defence that the call was invalid. The facts upon which the validity or invalidity of the call depended were these :—

A meeting of the directors of the Company was held on September 21, 1880, when a call of 1*l.* per share was resolved upon, and notice thereof duly given to the shareholders. At this meeting there were present just sufficient directors to form a quorum, and one of these was a Mr. May. Mr. May had admittedly acquired the fifty shares (which were fully paid up) necessary to qualify him for the office of director, by a transfer of the same to him in the month of August, 1880, from one Irwin, the General Manager of the Company, for a nominal consideration.

The shares so transferred were part of a number which had been allotted to Irwin by the Company, pursuant to the provisions of Article 78 of the Articles of Association hereinafter set out. The transfer of Irwin's fifty fully paid-up shares to May was, on September 16, 1880, confirmed by the Company, and May appeared in the Company's books as the registered holder thereof. Article 78 of the Articles of Association was as follows :—

" Each of such officers shall also be entitled to receive, in addition to the progressive salary hereinbefore provided, one-fifth per cent. per annum on the gross returns of the trading of the Company as appearing by the annual balance sheet : Provided always, and it is hereby declared, that it shall be lawful for the Company to make such last-mentioned payment in fully paid-up preference shares of the Company taken at par ; but such shares, if issued under this provision, shall be retained by the officer taking the same until seven years after the incorporation of the Company, and shall not be assigned,

A provision in Articles of Association that fully paid-up shares issued to an officer of the company should be retained by him and not dealt with by him for a period of seven years, Held to be a provision for the protection of the company, and not to entitle a shareholder to invalidate a call made at a meeting of directors at which a transference of such shares was necessarily present to form quorum, such transfer having been made by the consent of the company within the seven years.

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mortgaged, or dealt with during that period; and the Company may, if they think fit so to do, retain the certificates of such shares in their own possession, and make such entries in the books of the Company as may be necessary to give effect to this provision; but any annual dividend accruing on such share or certificate drawn in respect thereof, shall be payable to such officer."

Article 84 was as follows :—

"All acts done by any meeting of the directors, or of a committee of the directors, or by any person acting as a director, shall, notwithstanding that it be afterwards discovered that there was some defect in the appointment of any such directors or persons acting as aforesaid, or that they or any of them were disqualified, be as valid as if every such person had been duly appointed, and was qualified to be a director."

Bray for plaintiffs.

The defendant in person.

The question raised was as to whether, under the circumstances, May was a duly qualified director, and if not, whether the call was a valid one. His Lordship reserved this point for further consideration.

February 20. After argument, HIS LORDSHIP ruled that Article 78 was intended for the protection of the Company, and did not prevent Irwin from dealing with the shares as he had done with the sanction and assent of the Company. His Lordship also intimated (though it was unnecessary to rule on the point) that he was of opinion that even if May was not duly qualified, Article 84 would have prevented the call being impugned as invalid.

Judgment for Plaintiffs for 61l. 19s.

May, Sykes, & Batten.

Defendant in Person.

With respect to the question whether Article 84 of the Articles of Association would have cured the alleged invalidity of the call, see the observations of Lord Cairns in *Murray v. Bush*, L. R. 6 H. of L. at

pp. 69, 70 ; see, too, *The York Tramways Co. v. Willows*, L. R. 8 Q. B. D. 685 ; and the observations of Brett, L.J., at pp. 688—9, upon *Howbeach Coal Co. v. Teague*, 5 H. & N. 151 ; 29 L. J. Ex. 137 ; who at any rate expressly disapproved of it upon the question of Estoppel.

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TION LIMITED
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STEPHEN, J., and a C.J.

VIBERT r. EASTERN TELEGRAPH CO.

1883.

January 25.

THIS was an action for wrongful dismissal. The plaintiff entered into the defendant company's employment as a clerk in the month of August, 1873. The terms of his hiring were not defined, but he received at first a salary of 100*l.* a year, and this was in 1878 increased to 135*l.* a year. The salary was at first paid monthly, but afterwards fortnightly. The plaintiff's duties were those of a stationery clerk, and he was also employed in the defendants' Transfer Department. A stationery clerk in a telegraph office at a salary of 135*l.* per annum, payable fortnightly, found to be entitled to a month's notice.

On Nov. 23, 1881, the plaintiff was dismissed from his service, and received, in lieu of a month's notice, his salary up to December 31st, 1881. The plaintiff claimed to be entitled to a year's, or at all events, to three months' notice.

R. V. Williams, for the plaintiff.

Murphy, Q.C., and *Moulton* for the defendants.

HIS LORDSHIP left it to the jury to say what was a reasonable notice to a person in the plaintiff's situation, and the jury found that a month was.

Verdict and judgment for the defendants.

H. C. Godfray.

Bircham & Co.

See *Fairman v. Oakford*, 29 L. J. Ex. 459 ; 5 H. & N. 635.

At the same sittings, on January 17th, 1883, in a case of *Byrne v. Schott*, tried before Lopes, J. and a C.J., the plaintiff was the manager of several shops belonging to the defendant, and received a salary of £250, of which he deducted a proportionate part weekly out of the monies which came to his hands, and there was no agreement between the parties as to the length of notice necessary to terminate the engagement. The defendant gave the plaintiff a week's notice, but the jury found the plaintiff entitled to a month's.

STEPHEN, J., and a C. J.

BRUCE v. EVERSON.

1883.

February 12.

A workman detaining a chattel in respect of a lien for work done thereon has no claim for warehouse charges during such detention.

THIS was an action to recover damages for the wrongful sale by the defendant of certain furniture belonging to the plaintiff. The defendant counter-claimed for work done upon the goods, and warehouse charges in respect of the same.

H. D. Greene for the plaintiff.

The defendant in person.

In August, 1880, the defendant received certain furniture belonging to the plaintiff to be repaired by him for the sum of 6*l.* The amount not being paid, the defendant retained possession of the furniture, and ultimately sold it on June 3rd, 1881, when it realised 8*l.* 13*s.* 6*d.*

The defendant paid into Court the sum of 11*s.* and said that this together with the amount of his counterclaim for warehousing the goods until June, 1881, was sufficient to satisfy the plaintiff's claim in this action.

The jury returned a verdict for the plaintiff for 2*l.* 2*s.* 6*d.*, and his lordship, on the authority of *Somes v. British Empire Shipping Company*, 30 L. J. Q. B. 229 (H. L.), gave judgment for the plaintiff for 2*l.* 2*s.* 6*d.*

Hope.

Wright and Pilley.

See *Boardman v. Sill*, 1 Camp. p. 410, note.

MANISTY, J., and a C. J.

HARTCUP & CO. v. BELL.

1883.

February 13.

THIS was an action to recover 110*l.* for rent for two half years, terminating as to the first half-year on Oct. 11th, 1881, and as to the second half-year on April 5th, 1882. The defendant counterclaimed for damages for the breach of the covenant for quiet enjoyment, contained in the lease under which he held.

Rent as between landlord and tenant is apportionable under the Apportionment Act, 1870. The estoppel which enables a landlord, who is mortgagor without the legal estate to sue for rent, is mutual, and renders him liable on the covenants in the lease.

The property in respect of which the rent was claimed, consisting of a house, lands, and shooting rights, was demised to the defendant by one Gower, by an indenture made on the 23rd of October, 1878, for a term of eleven years, at a rent of 110*l.* a year, payable half-yearly on the 11th of October and the 5th of April in each year. This indenture contained a covenant on the part of Gower for himself, his heirs, executors, administrators, and assigns, with the defendant, his heirs, executors, administrators, and assigns, that the defendant should and might quietly hold and enjoy the premises during the term without any eviction or disturbance by Gower, his heirs, or assigns, or persons lawfully or equitably claiming by, from, or under him or them, or any of them.

There was nothing on the face of the lease to show that the lessor had not power to grant it, or was not the legal owner in fee of the premises.

By deed dated the 14th of June, 1871, Gower had conveyed the premises by way of mortgage to Collison and Reeve, under which deed the legal estate was vested in them at the time this action was brought.

By a deed of February 25th, 1881, Gower assigned his equity of redemption to the plaintiffs, and the defendant paid to the plaintiffs and the plaintiffs received of the defendant the half-yearly rent that accrued due on the 5th of April, 1881.

In July, 1881, Collison and Reeve, the mortgagees, put up the property for sale unconditionally, and without any reference to the existing tenancy, but it was not sold. During

1883. — the latter half of 1881, and up to the beginning of March, 1882, there was a correspondence between the defendant and the mortgagees, and also between the plaintiffs and the defendant, in the course of which the plaintiff informed the defendant that he was liable to be treated as a mere trespasser and ejected without notice by the mortgagees. At the beginning of March, 1882, the mortgagees informed the defendant that unless he would agree to certain terms proposed by them, they would treat him as a trespasser, and take legal proceedings against him to recover possession. Shortly after this, the defendant gave up possession of the premises. As to the date of this, there was a conflict of evidence, but the jury found that possession was given up, and accepted by the plaintiffs, on March 14th, 1882. The jury assessed the damages on the counterclaim at 150*l*.

J. G. Witt and Farwell for the plaintiffs.

Lumley Smith, Q.C., and *English Harrison* for the defendant.

Before entering up judgment his Lordship said he would consider (1.) What rent the plaintiffs were entitled to; (2) Whether the plaintiffs were liable on the covenant for quiet enjoyment.

February 14. HIS LORDSHIP said he had considered the Apportionment Act, 1870 (33 & 34 Vict. c. 95), and the case of the *The Swansea Bank v. Thomas* (L. R. 4 Ex. Div. 94). It was quite clear that under Sect. 2 of the Act the rent was apportionable, and that the plaintiff was therefore entitled to 104*l*. for rent up to March 14th, 1882. As to the plaintiff's liability on the counterclaim his Lordship referred to the cases of *Cuthbertson v. Irving* (4 H. & N. 742; 28 L. J. Ex. 306), and *Morton v. Woods* (L. R. 4 Q. B. 298, Ex. Ch.), and held that although the legal estate was outstanding in mortgagees, yet inasmuch as there was a reversion in fee simple in the plaintiff by estoppel, he could sue for rent under the lease, and must therefore be himself liable on the covenant for quiet enjoyment in the lease.

*Judgment for the defendant for 46*l*.*

Pritchard & Sons.

John Galsworthy.

Witt moved *ex parte* before both the Divisional Court (Manisty and Mathew, JJ.), and the Court of Appeal (Brett, Cotton, and Bowen, L.JJ.), to set aside the judgment on the ground (*inter alia*) that the plaintiff was not liable on the covenant, but the decision of the learned Judge was upheld in both Courts.

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[LIVERPOOL WINTER ASSIZES.]

WILLIAMS, J., *without a Jury.*

MASON AND OTHERS v. BISHOP.

1883.
February.

THIS was an action by the next-of-kin of John Wright Mason, deceased, claiming letters of administration of his personal estate and effects.

The defendant propounded a will of the deceased appointing her executrix. The plaintiffs replied that the will was not duly executed.

The will was prepared by one Thomas Reading, who stated in evidence that the testator asked him to prepare his will; he did so, and took it to the testator, who approved of it. Reading then told him that two witnesses were required, and the defendant, who was present, went out to fetch two witnesses. She brought into the room one Richard Hayes, whom the testator asked to be a witness to his signature; Hayes assented. The testator then signed his name at the foot of the will, and Hayes signed as a witness. Hayes then left at once, and as he left the house met one Thomas, who was waiting to come in as the second witness. Thomas next came into the room, and the testator asked him to be a witness to the will. Thomas asked the testator if that was his signature, to which he replied "Yes." Thomas said he should like to see him sign again, and the testator ran a dry pen over his signature. Thomas then signed as a witness. Reading was present during the whole time, but Hayes had left before Thomas came into the room. A stamp was then affixed to the will below the signature of the testator, who cancelled the stamp with a cross. The testator then asked

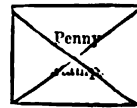
Where a witness in fact attested a testator's signature, but the form of attestation described him as only attesting the signatures of two other attesting witnesses (the attestation of one of whom was insufficient) probate of the will granted.

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Reading to be a witness to all the signatures. Reading said it was not necessary, but he wrote his name below the cancelled stamp, adding after his signature the words "witness to signatures below." He signed it because the testator asked him, and signed it intending to sign as a witness of all the signatures to satisfy the testator. Thomas was present during the whole of this time. The will was put in. The position of the several signatures was as follows :—

" * * * * *

JOHN WRIGHT MASON.



THOMAS READING,
 Witness to
 signatures below.

Signed by the testator in the
 presence of us present at
 the same time and who
 in his presence attest and
 subscribe this will.

RICHARD HAYES.
 ABRAHAM THOMAS.

Thomas was called, and confirmed the evidence of Reading.

Walton, for the plaintiff, contended that the attestation of the witnesses Hayes and Thomas was insufficient, as they were not both present together when the testator signed.

Pickford, for the defendant, admitted that this was so, but relied upon the attestation and subscription of Thomas and Reading as sufficiently satisfying the statute.

WILLIAMS, J. The language of the Wills Act is that the will "shall be signed at the foot thereof by the testator, and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time, and such witnesses shall attest and shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary." In this case it was conclusively proved that the testator signed his will in the presence of Abraham

Thomas and Thomas Reading, who being present at the same time saw him sign ; they both also subscribed the will in the presence of the testator, and indeed at his request, as witnesses of his signature and in presence of each other, although that was not necessary ; everything in fact existed as required by the statute, unless the form of attestation added by Reading to his subscription necessarily rebutted the affirmative evidence of the fact so as to exclude him as being an attesting witness to the signature of the testator. As a fact, the witness Reading did attest the signature of the testator in the presence of the witness Abraham Thomas, and in compliance with the express request of the testator he subscribed his name as witness of the testator's signature ; the form of the attestation therefore, though unquestionably evidence, and strong evidence, that Reading did not in fact attest the signature of the testator, is no more than evidence, and may be treated as a mistake and misdescription in the face of the conclusive affirmative evidence that the witness did in fact attest the signature.

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Probate of the will granted.

[LIVERPOOL WINTER ASSIZES.]

WILLIAMS, J., *without a Jury.*

J. W. HOLMES & Co. v. AMAZA DURKEE.

1883.

February.

THIS was an action upon a bill of exchange for 177*l.* 13*s.* 8*d.*, by the plaintiffs as holders against the defendant as indorser. The facts were these :—

The plaintiffs carried on business in Liverpool under the style of J. W. Holmes & Co. They had also until recently carried on business at Havre, in partnership with one W. B. Durkee, a son of the defendant, under the style of Holmes,

The rule that a drawer of a bill of exchange cannot sue an indorser, only applies where circuitry of action would otherwise arise.

Where the contract between a creditor, debtor,

and surety is embodied in a bill of exchange, in an action by the creditor against the surety on the bill, no other evidence save the bill is required to satisfy the Statute of Frauds, if the obligation revealed on the face of the bill is the precise obligation the surety has agreed to undertake.

1883. Durkee & Co. In December, 1880, the Havre partnership
 J. W. HOLMES & Co. was dissolved, and one of the terms of dissolution was that
 AMAZA DURKEE, v. W. B. Durkee, who was about to commence business under
 the style of W. B. Durkee & Co., should pay to the plaintiffs
 the sum of 1500*l.* by certain instalments to be secured by his
 acceptances indorsed by his father, the defendant, who assented
 to the arrangement, and the bill sued upon, together with
 others, was accordingly drawn by the plaintiffs upon W. D.
 Durkee & Co., payable to the order of the defendant and
 indorsed by the defendant and then delivered to the plaintiffs,
 pursuant to the terms of the agreement of dissolution. The
 bill was dishonoured, and this action was commenced against
 the defendant as indorser of the bill.

French, for the defendant, contended that the action could not be maintained, because, according to the laws relating to bills of exchange, the plaintiffs being the drawers could not sue the indorser, and if the defendant was liable at all it could only be upon his contract of suretyship, and there being no memorandum to satisfy the Statute of Frauds the action must fail, and he cited the opinion of Lord Blackburn in *Steele v. McKinlay*, 5 Appeal Cases, 754.

Walton, for the plaintiffs, contended that the only ground of objection to an indorsee who was also the drawer suing an indorser, is that it leads to circuity of action, the drawer being in general liable to an indorser who is called upon to pay, but as the defendant could not, upon the facts of this case, have any right against the plaintiff, there could be no circuity of action, and, therefore, the objections failed. He cited *Wilkinson v. Unwin*, 7 Q. B. D. 637, and the cases there referred to.

WILLIAMS, J.—“In my opinion the plaintiffs are entitled to succeed. The plaintiffs sue as indorsees and holders of a bill of exchange, and seek to charge the defendant as an indorser to them. Two points are made on behalf of the defendant. First, that the plaintiffs being also the drawers of the bill are precluded by the law relating to bills of exchange, from suing an indorser; this is no doubt the general rule, but the reason of the rule is that such a proceeding would lead to circuity of action, because as soon as

the indorser had paid the bill he would in turn be entitled to recover the amount from the drawer. In the present case the defendant could not have sued the plaintiffs as drawers, even if he had taken up the bill at maturity, therefore no question of circuitry of action can arise and the objection fails. The second point involved in Mr. French's objection is, that a bill of exchange being the creature of the law merchant, the defendant did not become an indorser to the plaintiffs of the bill in question, because, according to that law the only person who becomes a true and proper indorser of a bill must be himself a holder to whom the bill has been transferred, and who by indorsement transfers his right to an indorsee, and that what the defendant did here was essentially different from this ; that the defendant, if liable at all, could only be so upon a contract of suretyship which required to be verified by a memorandum in writing according to the Statute of Frauds, and that there being no such memorandum in this case, the action must fail. In support of this contention the opinion of Lord Blackburn in *Steele v. McKinlay* was cited. The actual point before me was not, however, judicially decided in *Steele v. McKinlay*, because it was not raised. The great contest in that case was whether James McKinlay, then deceased, who had written his name on the back of a bill of exchange drawn upon and accepted by his sons William and Francis McKinlay, could be regarded as a joint acceptor with them, and it was decided that, as he was not one of the drawees, the mere writing of his name upon the bill did not make him an acceptor. The facts of that case were essentially different from the present. There, the two sons had obtained certain advances from a bank, which were to be secured by a future mortgage, further advances were applied for and granted pending the preparation of the mortgage, and upon this occasion James McKinlay, the father, consented to become security for his sons pending the investigation and completion of the mortgage security, and by way of acknowledgment of this wrote his name on the back of his sons' acceptances, and it was sought to make him liable as a joint acceptor of the bills. The decision was that not being a drawee he could not become an acceptor ; and Lord Blackburn, as I read his opinion, further pointed out that neither was he an indorser ; that he in no sense occupied the position of indorser ;

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and that if anything he had become a surety for his sons upon terms which, to be binding upon him, must have been evidenced by a memorandum in writing within the Statute of Frauds. The present case is essentially different. It was proved conclusively before me that the defendant for good consideration verbally agreed to become surety for his son to the plaintiff, and to do so by entering into the relation of an indorser to the plaintiff of his son's acceptances, in other words he agreed to accept the precise obligation which would be imposed upon him if he had been a regular indorser of the bill to the plaintiff, and in pursuance of that agreement the bill was drawn by the plaintiff upon the defendant's son and made payable to the defendant's order, and the defendant wrote his name upon the bill for the purpose of thereby indorsing it to the plaintiffs with all the proper incidents of a regular indorsement. The real agreement entered into by the defendant exactly corresponded with the obligation which he would have incurred as a regular indorser, and it seems to me impossible after that for the defendant to say that he did not in fact become an indorser of the bill to the plaintiff both in form and in substance. The plaintiffs are therefore entitled to judgment.

Unless *Steele v. McKinlay* can be regarded as solely a decision on the question whether James McKinlay could be made liable as acceptor (and it is difficult to say that that was the sole question, inasmuch as James McKinlay in fact wrote his name on the back of the bill,) the rule laid down in that case appears to be that, where in an action on a bill of exchange the liability sought to be enforced is a liability not apparent from the form of the bill, the requisite proof, statutory or otherwise, must be given of the liability sought to be enforced, to entitle the plaintiff to succeed in his action. See the concluding words of Lord Selborne's judgment at p. 786. It follows from this that where, as in *Wilkinson v. Unwin* and the case above reported, the liability sought to be enforced is apparent on the face of the bill, there is no need of any further evidence at all; for, if the creditor be the payee of the bill and indorses it to the surety, and then, by indorsement from the surety becomes the holder of the bill, or if the bill be drawn payable to the order of the surety, who indorses it over to the creditor, in either case the liability sought to be enforced in an action by the creditor against the surety is the liability appearing on the face of the bill. See the observations of Lord Blackburn in *Steele v. McKinlay* at the top of p. 774 as to the form of bill that ought to have been adopted in *Matthews v. Bloxsome*, 33 L. J. Q. B. 209, with the consequence that the

action would then have been undefended; and his Lordship's observations lower down on the same page as to the only ground on which, having regard to the actual form of the bill, *Matthews v. Blossome* can be considered good law. Where, therefore, a guarantee is given *solely* by means of a bill of exchange, care should be taken that the form of the bill is such that it reveals an obligation exactly corresponding to the actual obligation undertaken by the guarantor.

1883.

J. W. HOLMES
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FIELD, J., and a S. J.

TREDEGAR IRON AND COAL CO. v. GIELGUD.

THIS was an action to recover damages for breach of contract. The contract was contained in a letter written by the plaintiffs to the defendant on the 20th of February, 1882, in the following terms:—

“TREDEGAR IRON AND COAL COMPANY, LIMITED,
London Office: 28, Queen St., Cheapside,
London, E.C.,

“Works: Tredegar, Monmouthshire.

February 20th, 1882.

“HENRY GIELGUD, Esq.,

“Dear Sir,—We beg to record having sold you to-day (four thousand) 4,000 tons of iron rails of 56 lbs. per yard, Sandberg pattern, and specification with proportionate fish-plates of ordinary pattern, at the price of 5*l.* 7*s.* 6*d.* (five pounds seven shillings and sixpence) per ton, free on board at Newport, subject to a commission to yourself of 1% (one per cent.). Payment to be made in net cash against invoices and bills of lading of each cargo by approved banker's credit, which is to be cabled before the end of this week, and the full detailed credit to be mailed so as to be confirmed to us by bankers here not later than the 5th of March. The rails and fish-plates are to be ready for shipment at Newport, as follows:—2,000 (two thousand) tons, with proportionate fish-plates, by 31st March, 1882, and 2,000 (two thousand) tons, with proportionate fish-plates, by 30th April, 1882; and in the event of vessels not being ready to load by these dates, then payment is to be made by approved banker's draft for 2,000 tons by April 15th, and the remaining 2,000 tons by 15th May, against invoice and dock warrants for these quantities.

1883.

February 15.

The ordinary rule as to the measure of damages in case of breach of contract to accept a manufactured article, applies equally in the case of an unmanufactured article.

Where, therefore, in the case of an unmanufactured article, there is a market price at the date of breach, the profits that would have arisen from the contract, and the losses sustained through its breach, cannot be considered as elements of the damage.

1883. This condition of payment (in the event of non-shipment) is
 TREDEGAR IRON to be confirmed to us by approved banker's credit also by
 AND COAL CO. the 5th of March. It is agreed that you may take a further
 r. quantity, not exceeding 700 (seven hundred) tons, on the above
 GIELGUD. terms and conditions (except as regards delivery), such further
 quantity to be ready for shipment by the 15th May ; but the
 option in this respect must be declared by you not later than
 the end of the present week—say the 25th inst. We will
 thank you to confirm the terms of this sale, and remain, &c.,
 “Tredegar Iron and Coal Co.,
 “E. PELLY.”

The defendant duly notified his intention to take the additional 700 tons under this contract. The order was for rails for American shipment, and the breach alleged was that approved banker's credit was not cabled, nor the full detailed credit mailed, so as to be confirmed to the plaintiffs. This had not been done, and the plaintiffs thereupon refused to proceed in the matter, and brought this action before they had manufactured any rails at all.

Murphy, Q.C., and Bremner, for the plaintiffs.

Finlay, Q.C., and Douglas Kingsford, for the defendant.

For the defendant it was contended that the contract was only conditional: that the non-arrival of the credit from America did not constitute a breach by the defendant: and that the defendant had not warranted that it would arrive.

FIELD, J. I am against you. Gielgud was to pay. The condition as to cabling and mailing the credit was made by Gielgud. The plaintiffs wanted a man in England to look to.

It was then agreed that the question as to the amount of damage recoverable should be taken before the learned judge without a jury.

Evidence was then given, on behalf of the plaintiffs, to show that there would have been a clear profit of 2,069*l.* 8*s.* 10*d.* if the contract had been carried through ; and that in consequence of the breach, the plaintiffs had sustained a loss through the works lying idle for a long time, &c., to the amount of 2,748*l.* 5*s.* 6*d.* It was also proved that the

demand for iron rails came almost entirely from America, that this demand absolutely ceased, quite suddenly, about the middle of March, 1882, and that this was the last contract for iron rails of any considerable quantity that was entered into.

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The plaintiffs had been unable to obtain an offer for the rails to be manufactured even at 5*l.* a ton, and the defendants admitted that it would have been impossible for the plaintiffs to have sold this contract against the buyer. The plaintiffs admitted that it might have been possible to obtain orders in England for lots of 400 or 500 tons; but as to the whole quantity that could have been so sold, or the prices obtainable, no evidence at all was given. The defendant called no evidence at all.

Murphy, Q.C., and *Bremner*, for the plaintiffs.

We are entitled to be put into the same position as we should have been in, if the contract had been carried out. *Cort v. The Ambergate, &c., Railway Co.* (17 Q. B. 127; 20 L. J. Q. B. 460.) We claim, therefore, the profits we should have made, and the losses we have actually sustained. *The Hydraulic Engineering Co. v. McHaffie* (L. R. 5 Q. B. D. 670, C. A.) The evidence shows there was really no market at all: but at any rate we are entitled at least to 7*s.* 6*d.* per ton, as we could not get an offer at 5*l.* per ton.

Finlay, Q.C., and *Kingsford*, for the defendant.

Only nominal damages are recoverable. The estimate of profit and loss is speculative, and too uncertain to be acted upon; the want of market, if any, was owing to an unexpected event, which was not within the contemplation of the parties at the time of the contract. No earnest endeavours were made by the plaintiffs to get rid of the contract; and they might have been able to dispose of the whole quantity in lots of 400 or 500 tons without any loss whatever.

Murphy, Q.C., in reply. In this case an account ought to be directed for the purpose of ascertaining what sum paid by the defendant would put the plaintiffs in the same position, as they would have been in, if the contract had been fulfilled.

FIELD, J., after stating the facts, said that it was difficult

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to ascertain the ultimate date of breach, but that this was not material, as a state of the market appeared to have set in early in March, which did not seem to have afterwards varied; that the case was not in a satisfactory condition, and the evidence not very clear; that it was, however, admitted that the whole contract could not have been disposed of, but no evidence given as to the prices at which the lots of 400 or 500 tons could have been disposed of, if the 4,700 tons had been split up. The plaintiffs by their particulars laid their damages at over 4,800*l.*, which sum was composed of two elements (*a*) a clear profit of 2,069*l.* 8*s.* 10*d.*, and (*β*) a loss of 2,748*l.* 5*s.* 6*d.*; but that at the hearing it was insisted that the plaintiffs were at any rate entitled to the difference between the contract price and the market price at the date of breach; and it was contended that the evidence showed a difference of at least 7*s.* 6*d.* a ton. This was the ordinary rule, nor could his lordship find that it made any difference whether for a manufactured or unmanufactured article; that if there be no market, it was settled that some other means of estimating the damages must be resorted to. The defendants called no evidence to show that there was a market; but there was evidence which showed that the price had gone down.

With respect to the claim for the profits, and the question whether profits came within the contemplation of the parties, his lordship declined to express any opinion, but said he must assess the damages upon the evidence before him as a jurymen; that he was not satisfied that 7*s.* 6*d.* per ton represented the actual loss, if the plaintiffs had really done their best to mitigate the loss as they were bound to do, and gave judgment for the plaintiffs for 1,100*l.*

Ashurst, Morris & Crisp. Wilkins, Blyth & Dutton.

Cort v. The Ambergate Railway Co. (ubi supra), and The Silkstone and Dodsworth Coal, &c., Co. v. The Joint Stock Coal Co., (35 L. T. N. S. 668) appear to be the only cases reported in which the measure of damages, in the case of a breach of contract to accept goods not yet manufactured, when there is no market price, has been considered by the Courts. In the case above reported, Field, J., considered that there was some evidence of market value on which he could act. If, however, there had been no market value, it seems that the true measure of damage in such

a case would be the difference between the cost of production and the contract price. The more satisfactory way of ascertaining this would appear to be to direct an exact inquiry at Chambers or elsewhere, rather than to attempt such an investigation in open Court. (See Sedgwick on Damages, pp. 76, 77, 4th edition ; and the judgment of Nelson, C.J., in *Masterton v. Mayor of Brooklyn*, 7 Hill, 62.)

As to the claim for profits : of course the difference between the cost of production and the contract price exactly represents the profit to be derived by the seller upon the transaction, and is clearly recoverable, as being exactly what the seller of an article to be manufactured bargains for. So, too, inasmuch as the market price of goods normally exceeds the cost of production by the ordinary profit of the particular trade, it follows that the damages, if any, recoverable in the case of breach of contract of sale of manufactured goods by a purchaser (*i.e.*, the difference between the contract price and the market price at the date of breach) really are the profit which the seller would have made by the contract.

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FIELD, J., and S. J.

GILBERT v. THE NORTH LONDON RAILWAY CO.

1883.

February 17.

THIS was an action brought by the plaintiff to recover damages for injuries sustained by him in a railway accident while travelling upon the defendants' line.

The accident was caused by the breaking of a drawbar which joined two trucks, in a train of fifty, running upon the down line of the defendant company, which upon fracture was drawn out and, hanging down, caught upon a sleeper, and thus acting as a lever forced the wagon over on to the up line and fouled it.

The passenger train in which was the plaintiff coming upon the up line collided with the fallen truck, and the plaintiff in consequence sustained injuries. The truck which fell was not the defendants', and the negligence alleged by the plaintiff was failure on the part of the defendants to make a proper examination of the truck before permitting it to run upon their line.

The substantial defences were: (1) A general denial of the negligence ; (2) That the accident was caused by the breaking of the drawbar, owing to a latent defect therein, in a

Where an accident happened on a railway company's line owing to a latent defect in a foreign truck which could not have been detected by the ordinary examination. Held that as the facts proved were as consistent with the exercise of due and reasonable care as with negligence, the plaintiff must be nonsuited.

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foreign truck which the defendants were by statute bound to run upon their line.

The wagons were coupled by iron bars running underneath them, which overlap at the coupling point, and were bored to admit of the insertion of an iron pin. An iron cap or "washer," which is bored in the same way, was slipped over the coupling point, and an iron pin inserted through all. The holes in the coupling bars (called "cotter holes") are therefore hidden from view by the "washer."

J. J. Sims for the plaintiff.

Sir F. Herschell, S. G., Murphy, Q.C., and T. T. Paine for the defendants.

For the plaintiff witnesses in the employ of the defendant company were called, who proved that the fracture took place at the "cotter hole" of the bar. That there was a flaw through the entire thickness of one side of the "cotter hole" which must have existed some time, and that the sectional area was considerably reduced by abrasion. That in their opinion the breaking was due to the flaw. That the iron was bad iron. That the form of construction of the drawbar was unusual, as the "washer" concealed the "cotter hole," and could only be removed with great difficulty; in fact the truck must have been sent to the workshop first.

There was no entire thickness of iron in the bar at the cotter hole to compensate for weakness caused by the boxing. It further appeared that this truck had been examined in the usual way in which all foreign trucks coming on to the defendants' system (of which there were large numbers at all points of contact) were examined by them.

At the close of the plaintiff's case, the *Solicitor General* submitted that there was no case to go to the jury. That the truck was not the defendants', and therefore they could have been guilty of no negligence in its construction. It had been sent on to their line and they were by statute bound to take it. It was the defendants' duty to make the usual and practicable examination, and this they had done. He cited *Richardson v. The Great Eastern Railway Co.*, L. R. 1 C. P. D, 142.

Sims, for the plaintiff, contended that the examination made was not a sufficient one. That ironwork being there, a flaw in which might cause an accident, it should have been examined as much as the portions exposed. The defendants were not bound to run the truck (Railway Traffic Act, 8 Vict. c. 27, ss. 117—121). They might have rejected it. The construction was an unusual one, which could have been ascertained even by the ordinary examination; and then there was need for a further examination which should have been made.

The *Solicitor General* in reply.

FIELD, J. I think there is no case for the jury. If in such cases as these the facts proved are as consistent with the supposition that due and reasonable care has been exercised, as that there has been negligence, the plaintiff must fail. He has failed here to weigh down the balance on the side of negligence. He says there is evidence of negligence. That the construction was an unusual one, because the washer covered the "cotter hole." If there had been anything here apparent upon the face of the bar, as in *Richardson v. The Great Eastern Railway Co.* (*ubi supra*), to indicate to a careful man a defect in the iron, I should have thought it his duty to make further enquiry. I do not think there was anything here to induce a careful and reasonable man to prevent this truck from running upon the defendants' line. The plaintiff must be nonsuited.

A. Moore.

Paine, Layton & Pollock.

In a case of *Allen and Wife v. The North London Railway Co.*, arising out of the same accident, and tried the same sittings, the same learned Judge nonsuited the plaintiff, and his ruling was upheld by both the Divisional Court and the Court of Appeal.

The liability of carriers of passengers by land was fully considered in the case of *Redhead v. The Midland Railway Co.*, L. R. 2 Q. B. 412; and in *Ex. Cham.*, L. R. 4 Q. B. 379; where the Exchequer Chamber unanimously affirmed the decision of the majority of the Court of Queen's Bench, and laid down the principle that while it is incumbent on a carrier of passengers by land to exercise due care and vigilance in seeing that whatever is required for the safe conveyance of their passengers is in fit and proper order, yet that there was no warranty of the "roadworthiness" of the vehicle employed. On the other hand Mr.

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RAILWAY CO.

Justice (now Lord) Blackburn, the dissenting Judge in the Court of Queen's Bench, delivered a strong judgment in support of the view that the obligation of the carrier in such a case is an absolute obligation at his peril to supply a vehicle reasonably sufficient for the service, or be responsible for any damage resulting from a defect.

CAVE, J., and a C.J.

1883.

February 22.

ASKEW v. LEWIS.

A bill of sale, the time for the renewal of the registration of which under the Bills of Sale Act, 1866, has expired before the commencement of the Bills of Sale Act, 1878, cannot be re-registered under s. 14 of the latter Act.

THIS was an interpleader issue, on the hearing of which the sole question was found to be whether the provisions of sect. 14 of the Bills of Sale Act, 1878, as to renewal of registration, applied under the following circumstances. The jury were discharged by consent.

By a post-nuptial settlement made on the 31st of May, 1869, Driscoll, the execution debtor, settled upon his wife the furniture seized by the execution creditor, and the deed was registered in accordance with the provisions of the Bills of Sale Acts, 1854 and 1856, on the 9th of June, 1869.

By sect. 4 of the Act of 1866, it is provided that, unless the registration of a bill of sale be renewed within five years, at the expiration of that time the registration shall cease to be of any effect. The Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), came into operation on the 1st day of January, 1879, and by sects. 11, 14, and 23, provides for the renewal of registration.* No steps were taken to renew the registration

* Section 11. "The registration of a bill of sale, whether executed before or after the commencement of this Act, must be renewed once at least every five years, and if a period of five years elapses from the registration or renewed registration of a bill of sale without a renewal or further renewal (as the case may be) the registration shall become void."

Section 14. "Any Judge of the High Court of Justice on being

satisfied that the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by the Act, or the omission or misstatement of the name, residence, or occupation of any person was accidental or due to inadvertence, may, in his discretion, order such omission or misstatement to be rectified by the insertion in the register of the true name, residence, or occupation, or by extending the time for such registration on such

of the deed of May 31st, 1869, until the 21st of December, 1881, when, upon an *ex parte* application at chambers, it was ordered that the proper officer should be at liberty to re-register the deed, notwithstanding that the time of so doing had expired, and that the said order should be without prejudice to any rights of parties acquired prior to the actual re-registration of such deed. The deed was re-registered on the 24th of December, 1881. Subsequently to this the judgment was obtained, upon which it was sought to take in execution the furniture comprised in the deed.

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Bowen Rowlands, Q.C., and L. C. Jackson for the plaintiffs (trustees of the deed).

Aspland for the execution creditor.

CAVE, J. I have consulted the learned Judge who made the order at chambers, and find that the question as to the applicability of the Act of 1878 was never called to his attention; so I must decide the question for myself. Under the Act of 1866, renewal of registration was necessary every five years. The bill of sale in this case had not been so renewed when the Act of 1878 came into operation; and I must decide whether sect. 14 of the Act of 1878 applies to the case. (His Lordship read the section.) In deciding this, I must look to sect. 23. (His Lordship read the section.) Now the effect of this latter section is that the Act of 1878 is not to apply unless this is a case falling within the exceptions. The exception as to construction is dealt with by sect. 7, and the exception as to renewal of registration is dealt with by sect. 11.

March 12.

terms and conditions (if any) as to security, notice by advertisement or otherwise, or as to any other matter as he thinks fit to direct."

Section 23. "From and after the commencement of this Act, the Bills of Sale Act, 1854, and the Bills of Sale Act, 1866, shall be repealed, Provided that (except as is herein expressly mentioned with respect to construction and with respect to renewal of registration), nothing in the Act shall affect any bill of

sale executed before the commencement of this Act, and as regards bills of sale so executed, the Acts hereby repealed shall continue in force.

"Any renewal after the commencement of this Act, of the registration of a bill of sale executed before the commencement of this Act, and registered under the Acts hereby repealed, shall be made under this Act, in the same manner as the renewal of a registration made under this Act."

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ASKEW

v.

LEWIS.

Both of these make express mention of bills of sale executed before the commencement of the Act; but sect. 11 does not apply to the present case. It is, however, argued that sect. 14 applies. This section, however, contains no express mention of bills executed before the Act came into operation, and the reference to "the omission to register a bill of sale or an affidavit of renewal thereof within the time prescribed by this Act" points to bills executed after the commencement of the Act of 1878, and to bills registered under the previous Acts, the time for the renewal of the registration of which had not expired when the Act of 1878 came into operation. I think, therefore, that sect. 14 does not apply to this case, and that the execution creditor is entitled to succeed on this issue.

*Woodard & Hood.**Horman Fisher.*

DAY, J., and a C. J.

PALMER v. HUMMERSTON.

1883

February 23.

Where a person courts the alleged slander by a question, the occasion is privileged. Where evidence has been given showing an utterly untrue statement to have been made, that is of itself sufficient *prima facie* evidence of express malice.

THIS was an action brought by the plaintiff to recover damages from the defendant, an innkeeper in Knightsbridge, for an alleged slander.

The plaintiff stated that on the 28th of June, 1882, he called at the "Trevor Arms," and there saw the defendant, and asked him, in the presence of one Knibbs and the defendant's son, what he meant by saying that he (the plaintiff) had taken sovereigns over his (the defendant's) counter from his barmaid, and that to this the defendant replied, "I have been informed by a woman that you have received sovereigns from my barmaid, Miss Fairbairn, across the counter, and that you have gone to another public-house, the 'Coleherne Arms,' and have tossed up the same sovereigns there, saying you could get them from the barmaid at the 'Trevor,' and that you could obtain plenty more from the same quarter." And that the defendant further said that he had suspected the plaintiff for some time of receiving money, and that he had

put detectives on to watch the plaintiff. Evidence was then given to show the falsity of the imputation conveyed by the alleged slander.

1883.
PALMER
v.
HUMMERSTON.

Anderson for the plaintiff.

Grantham, Q.C., and *F. Turner* for the defendant.

At the close of the plaintiff's case, *Grantham, Q.C.*, submitted that there was no case to go to the jury, because the plaintiff, having courted the words imputed by a question to the defendant, the occasion was privileged; and there was no evidence of express malice, for even assuming that the words spoken were utterly untrue, that of itself was not sufficient evidence of express malice. He cited *Clarke v. Molyneux*, L. R. 3 Q. B. D. 237.

THE LEARNED JUDGE ruled that the occasion was privileged, but that the case must go to the jury, as evidence showing an utterly untrue statement to have been made, though on a privileged occasion, was of itself sufficient evidence of express malice for the case to be left to the jury. The learned Judge directed the jury that unless they were satisfied that the defendant had acted maliciously, not believing what he said to be true, and with an improper motive, they must find for the defendant. The jury found a verdict for the defendant.

H. E. Sullivan.

Peckham, Maitland & Peckham.

As to the privilege sheltering communications made in answer to an inquiry by the plaintiff himself, or by some one on his behalf, see *Taylor v. Hawkins*, 16 Q. B. 308; and *Cowles v. Potts*, 34 L. J. Q. B. 247. On the question as to whether, on a privileged occasion, the mere untruth of the defamation is, in every case, evidence of express malice for the jury, although in the above case the learned Judge, by leaving the question to the jury, prevented the possibility of a new trial (see O. XL. r. 10 of the Rules of Court, 1875), and as a matter of fact, put an end to the litigation, it is submitted that it is not (see *Taylor v. Hawkins*, *ubi supra*, and the observations of Parke, B., in *Wright v. Woodgate*, 2 Cr. M. & R. 573; Tyr. & G. 12; and of Maule, J., in *Somerville v. Hawkins*, 16 L. T. 283). If it were so, in all cases of privilege not absolute, there must always be a question as to malice for the jury, where no plea of justification is put in.

FIELD, J., *without a Jury.*

MUSGRAVE *v.* STEVENS AND BRADBURY.

1883.

February 28.

A sale of wheat with the assent of an insolvent tenant for the purpose of paying the incoming valuation due to the landlord, is not a sale in the ordinary course of business within the meaning of the licence implied by law in the case of a bill of sale given by a trader left in possession of his stock-in-trade.

In this case the defendant Bradbury counterclaimed against the plaintiff, and at the trial of the action, on February 14th, before Field, J., with a jury, it was agreed that the counterclaim should be tried by the learned judge without a jury. It now came on for hearing.

The counterclaim was to recover the proceeds of sale of certain wheat, which had come to the hands of the plaintiff under the following circumstances:—

By a lease made on August 13th, 1880, Stevens became tenant to the plaintiff of a farm at Shillington, at a yearly rent of 320*l.* Stevens did not pay to the plaintiff the incoming tenant's valuation of 97*l.* 6*s.* 6*d.*

By a bill of sale made on December 10th, 1880, Stevens assigned (*inter alia*) his growing crops, farm implements, and other goods, chattels, and effects in and about his house and premises to the defendant Bradbury, and the bill of sale contained a proviso that Stevens would not remove or permit or suffer to be removed the said stock, goods, chattels, and effects, or any of them from the said dwelling-house and premises without the previous consent in writing of Bradbury.

On the 17th of August, 1881, the plaintiff, a year's rent being in arrear, seized the goods and effects on the premises and also the growing corn under a distress for rent. The incoming valuation still remained unpaid. Stevens was also unable to pay his rates and taxes, and Joyce, the landlord's agent to levy the distress, supplied the funds for harvesting the corn, including the labourers' wages. The corn was thrashed out, and the part of it, the subject of this counterclaim, was sold on the 10th of September, 1881, for 85*l.* 3*s.* 9*d.* The corn had not been appraised before sale, but Joyce, with the consent of Stevens, instructed one Hare to sell, received from Hare the proceeds of sale, and handed the same over to the plaintiff in part payment of the unpaid

incoming valuation, in pursuance of an arrangement between Joyce and Stevens to that effect.

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Murphy, Q.C., and *A. Glen* for Bradbury, contended that the sale was not one in the ordinary course of business, so as to come within the licence to be implied from the bill of sale, and that he was entitled to follow the proceeds in the plaintiff's hands.

Bompas, Q.C., and *De Castro* for the plaintiff, contended that the sale was a sale by Stevens with the permission of Joyce, that it was in the ordinary course of business, the time of year, and circumstances, being suitable for it, and that the sale itself was not calculated to injure Stevens' business; that the purchaser of the corn would have had a good defence, if sued in trover, and that, therefore, the plaintiff must have a good defence on his counterclaim, as the sale, if good at all, must be good for all purposes.

FIELD, J., after reviewing the facts as to Stevens' position, and stating that in his opinion, he was hopelessly insolvent, and obviously unable to carry on the farm, continued: "The landlord had a lien on the growing crops, but for rent only. Joyce wanted to secure the incoming valuation, and knew that the proceeds, if the wheat were sold under the distress, could only go to pay the rent. The true nature of the transaction was that Joyce sold the corn, Stevens assenting to the sale, and waiving any irregularity, as to want of appraisement or otherwise before sale.* The real question is 'Was the sale within the implied licence contained in the bill of sale?'" See *per Lush, J.*, in *The National Mercantile Bank v. Hampson* (L. R. 5 Q. B. D. 177), and Lord Coleridge's amplification in *Taylor v. McKeand* (L. R. 5 C. P. D. 358). Lord Coleridge says, "It is said that a bill of sale of stock-in-trade, when the trade is to be carried on, must always be subject to an implied condition that the grantor shall have liberty to deal with the goods for the purpose of the business. But in expressing that condition, the law engrafts upon it this limitation, that the business must be carried on *bonâ fide*, and in the ordinary course of business." These two

* See 2 Will. & M. c. 5, s. 1.

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cases taken together lay down what are the terms to be implied, and I do not think this case is within those terms. This was not a sale in the ordinary course of business. The licence is a sort of trust. You assume that as tenant he will use his goods for a proper purpose. The discretion of the man of business in carrying on his business is implied, and Stevens had no idea that he was carrying on his business by assenting to this sale.

J. J. Chapman.

Chipperfield.

STEPHEN, J., and a C. J.

HAZELDINE v. HEATON.

1883.

March 1.

Where a lease has been assigned, payment of a quarterly instalment by the assignee pursuant to agreement, does not operate as an attornment.

THIS was an action to recover damages for the wrongful seizure of certain goods and for the sum of 31*l.* 6*s.* 6*d.* paid under protest by the plaintiff to the defendant under the following circumstances:—

Jarvis for the plaintiff.

Powell, Q.C., and *Vennell* for the defendant.

The defendant Heaton was the lessee of a house and premises in Kentish Town for a term expiring in March, 1882.

By a deed dated the 21st day of June, 1881, Heaton assigned the residue of his term to one Pooley, in consideration of a sum of 10*l.* to be paid for fixtures, and a yearly rent of 55*l.* to be paid quarterly, and gave up possession of the premises to him. By a bill of sale dated the 29th day of August, 1881, in which the consideration was stated to be 100*l.*, Pooley assigned to the plaintiff the furniture on the said premises. Pooley in December, 1881, sent a cheque in respect of the quarterly instalment due from him at Michaelmas and Christmas. This, however, was dishonoured, and Heaton thereon levied a distress for rent against Pooley and seized the goods comprised in the bill of sale.

The plaintiff paid the amount of the distress, 31*l.* 6*s.* 6*d.*, under protest, and then brought this action.

The defence set up was (1) that the signature to the assignment had been obtained by fraud, the intention being that Pooley should become *tenant* to the defendant. (2) That the sending of the cheque amounted to an attornment, and so the defendant was entitled to distrain as landlord. (3) That the consideration for the bill of sale was not truly stated, and that, therefore, the bill was void.

The jury having found that the consideration for the bill of sale was not truly stated, and that Heaton's signature to the assignment was obtained by fraud, his lordship reserved the case for further consideration.

Jarvis.—The finding of the jury as to fraud is immaterial, the plaintiff was not a party to it; further, Heaton had not avoided the transaction; the bill of sale is good between grantor and grantee though the consideration is untruly stated. If the landlord had a right to distrain, the bill of sale is never good against him; but if he had not, the misstatement of the consideration cannot help him.

Powell, Q.C., and *Vennell* contended that Pooley had attorned to the defendant and that the defendant had a right of distraint by estoppel, and cited *Evans v. Matthias*, 26 L. J. Q. B. 309; 7 E. & B. 590—601; *Jolly v. Arbuthnot*, 28 L. J. Ch. 547; 4 De G. & J. 224; Woodfall, 894, 10th Edition.

STEPHEN, J., said the validity of the distress depended on whether the defendant had a reversion; that in his opinion he had none; the sending of the cheque was no attornment, for the payment of the money was only a carrying out of the contract between the parties. As to the consideration for the bill of sale being untruly stated, that though this would have invalidated the bill as between the grantee and the execution creditor, the bill of sale was good as between the grantee and the grantor or any other person entering on the goods without title; and as the distress was bad, the defendant was in possession wrongfully, and the holder of the bill of sale had a right to the goods.

Judgment for the plaintiff for 31l. 6s. 6d.

R. B. Horman.

F. J. Holmes.

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Mar h 5.

CAVE, J., and C. J.

1883.

CLENCH v. D'ARENBERG.

March 1.

To render a lodging-house keeper liable for the wrongful acts of a servant, the lodging-house keeper must have been guilty of such a misfeasance, or such gross misconduct, as an ordinary and reasonable person would not have been guilty of.

THIS was an action by the plaintiff, a lodger, to recover from the defendant, a lodging-house keeper, the value of certain goods of his which had been stolen, as he alleged, by reason of the negligence of the defendant.

The negligence alleged was the employment by the lodging-house keeper of a previously convicted felon from a City Mission for felons, she having employed through this Mission a man Rose to whitewash certain rooms in the house, who, it was admitted, had stolen the goods in question.

C. H. Anderson for the plaintiff.

Yelverton, for the defendant, cited *Calye's Case*, 1 S. L. C. 131, 8th Edition, and *Holder v. Soulby*, 29 L. J. C. P. 246, to show that a lodger could not recover against the lodging-house keeper in such a case.

CAVE, J., ruled that it was a question for the jury whether the lodging-house keeper had been guilty of such a misfeasance or such gross misconduct as an ordinary and reasonable person would not have been guilty of.

In directing the jury, His Lordship said: In order to entitle the plaintiff to recover, he must satisfy you that the defendant has been guilty of some grave misconduct. A lodging-house keeper is not bound to take active steps to protect a lodger's property, but if he is guilty of some grave and improper conduct by which a lodger's property is lost, he is liable. If he engages a servant from a respectable place he would not be liable to his lodgers for the wrongful acts of that servant, but if he goes to an improper place, and engages a servant many times previously convicted of crime, a jury would probably come to the conclusion that the lodging-house keeper was guilty of such gross negligence as to make him liable to his lodgers for that servant's wrongful acts. You must be satisfied that what the defendant did here was

gross misconduct upon her part; if not, your verdict must be for the defendant.

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v.

D'ARENBERG.

Verdict for the plaintiff.

Foster.

James Green.

See *Dansey v. Richardson*, 23 L. J. Q. B. 217.

STEPHEN, J.

GOODLAND *v.* EWING.

1883.

March 7.

IN this action the plaintiff sought to render the defendants, who were executors of one Russel, personally liable for rent under the following circumstances.

Russel, at the time of his death in April, 1879, was tenant to the plaintiff's predecessors in title of certain premises under a lease, of which 14½ years had yet to run, at a rent of 800*l.* a year.

The defendants, his executors, entered into possession, carried on the business, and paid the rent up till Christmas, 1880. On December 1st, 1880, the defendants assigned their interest in the term to one Bompas for a sum of 1500*l.*, which they paid in to the testator's estate as assets.

The rent up to Christmas, 1881, was paid to the plaintiff by the tenants in occupation, but the receipts which were given to the tenants were made out to the defendants.

This action was brought against the defendants personally to recover the rent due in respect of the quarter ending at Lady-Day, 1882.

When executors received a premium upon the assignment of a lease and paid the amount in to their testator's estate. Held that they were not personally liable for rent accrued due after the assignment in respect of the premium so paid in.

Collins, Q.C., and Stokes for the plaintiff.

Beddall, for the defendants, contended that their liability ended on the assignment in 1880: their leasehold interest and privity of estate with the plaintiff then ceased; he cited *Taylor v. Shum*, 1 Bos. & Pul. 21; *Leigh v. Thornton*,

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1 Barn. & Ald. 625 ; *Rubery v. Stephens*, 4 B. & A. 241 ;
Williams on Executors, vol. 2, p. 1765 (8th ed.).

Collins, Q.C., for the plaintiff, referred to Williams on Executors, vol. 2, p. 1762, and contended that in none of the cases cited did any profit accrue to the executors by the assignment. Here the profit should stand charged with the payment of the rent: their proper course was to offer to surrender the lease to the landlord.

STEPHEN, J. The question is, where an executor sold the lease and got money for it, which he treated as part of the assets of the estate, is it specifically charged with the rent, and is it a mistaken act on the part of the executor to pay that sum in to the testator's estate, and can the landlord sue for rent from the executor out of the sum for which he sold the lease? It is admitted that up till Christmas, 1880, the executors were personally liable for the rent while in possession as assignees, and the question is whether on the sale they ceased to be liable, or by having paid the money received in to the estate they were guilty of an act which renders them liable to be sued personally. The effect of the assignment ends the privity of the estate between the executors and the landlord, as the executors had power to assign. Now, was this 1500*l.* specifically charged to the landlord for rent? The passage cited by Mr. Collins from Williams on Executors, has reference only to the peculiar position of an executor as assignee, and which is different from and more favourable than that of an ordinary assignee, and it does not apply to this case. I, therefore, give judgment for the defendants.

Whitakers & Woolbert.

Lumley & Lumley.

With regard to the liability of an executor for rent due in respect of his testator's leaseholds; in his *representative* capacity, he is, as his testator's *alter ego*, liable in all cases in which his testator would have been liable, though, of course, only to the extent of his testator's assets. Hence his liability for rent which has accrued due before the testator's death (*Fruen v. Porter*, 1 Sid. 379), and his liability for rent due after the testator's death (*Hovce v. Webster*, Yelverton, 103; *Hillier v. Casbert*, 1 Lev. 127); hence, too, his liability for rent, when it has accrued due after an assignment by himself, or his testator, where his testator was the original lessee (1 Wms. Saunders, 241*a*, note 5), and his non-liability

after assignment, by himself or by his testator, if his testator was an assignee of the lease, and not an original lessee (*Taylor v. Shum*, 1 Bos. & Pull. 21). The measure of what would have been his testator's personal liability is the measure of the executor's representative liability.

The *personal* liability of an executor depends solely and entirely upon his entry into possession and perception of the rents and profits. "It is necessary that the land should have been occupied by the defendant, his agents, or under-tenants during the time for which the compensation is claimed for use and occupation, though it need not have been beneficially or even actually so enjoyed, but the defendant must have taken possession, and continued to have his right of occupation whenever he releases." (*Per* Parke, B., in *Nation v. Tozer*, 4 Tyrwhitt, 561; 1 Cro. M. & R. 176.) After entry, his position becomes that of an assignee in fact, instead of, as before, that of an assignee at law merely. But even after entry, his personal liability in respect of rent is limited to the actual annual value of, or profit received from the premises, or which with ordinary and reasonable diligence he might have received (*Rubery v. Stephens*, 4 B. & A. 241; 1 Nev. & M. 185; *Hopwood v. Whaley*, 6 C. B. 744); and of course the personal liability of an executor, who has entered into possession, ceases upon assignment, as does that of an ordinary assignee.

It is submitted that having regard to the judgments of Tindal, C.J., in *Woolaston v. Hakevell* (3 M. & G. 297), of Channell, B., in *Kennedy v. Oxley* (2 H. & C. 896), and of Richards, B., in *Green v. Lord Listowel* (2 Ir. L. R. 384), the doubt suggested in Williams on Executors, vol. ii. p. 1761, note B., 8th ed., as to the personal liability of an executor depending upon entry is ill-founded, and that there is and can be no other ground for rendering him personally liable at all.

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GOODLAND
r.
EWING.

FIELD, J., *without a Jury*.

WAGSTAFF v. CLINTON.

THIS action was brought by the plaintiff, the trustee in bankruptcy of one Wilkinson, to recover the sum of 2,446*l.* 4*s.* 7*d.*, the amount of the outgoing valuation of the bankrupt tenant. The defendant admitted that this was the proper amount of the valuation, but claimed to deduct therefrom the sum of 869*l.* 19*s.* 8*d.*, the amount of the bankrupt's unpaid incoming valuation, and their right to make this

a valuation of tenant right equal in value and of the same nature and kind." Held not to create a personal debt to the lessor, but to enure for the benefit of a subsequent landlord.

1883.
March 11.
An agreement by a tenant under a lease to pay interest at 5 per cent. on the amount of his incoming valuation, and "upon quitting to leave

1883.

WAGSTAFF
v.
CLINTON.

deduction was the sole question in dispute in this action. The material facts as to this were as follows.

Wilkinson in July, 1869, became tenant of two farms in Nottinghamshire to certain trustees who were mortgagees of the life interest of the Duke of Newcastle in the said farms. The amount of the incoming valuation due from Wilkinson upon his entry was 869*l.* 19*s.* 8*d.* This he did not pay, but agreed by the terms of the lease to pay interest at 5 per cent. upon the said sum, and "upon quitting to leave a valuation of tenant right equal in value and of the same nature and kind as that found upon his entry." On the 22nd of February, 1879, the Duke of Newcastle died, and thereupon the defendants became entitled as trustees of the settled property to the said farms. Wilkinson became bankrupt in April, 1879, and the plaintiff was appointed trustee in bankruptcy on the 19th of May, 1879. As trustee he continued to hold the farm, and from the March quarter, 1879, until the termination of the lease at Michaelmas, 1881, he paid rent, and also the 5 per cent. interest on the incoming valuation to the defendants.

A. Wills, Q.C., and Cyril Dodd for the plaintiff.
Anstie, Q.C., and Lindsell for the defendants.

The plaintiff's contention was that the 869*l.* 19*s.* 8*d.* was a debt due, not to the defendants, but to the original lessors, and that, therefore, the defendants were not entitled to deduct it, but :

FIELD, J., said, "No debt due to the original lessors ever came into existence at all. If there had been merely a valuation made and then an agreement to pay interest, then there might have been a debt. But in this case the agreement was, not that the tenant would pay the amount, but that he would leave the amount, that is to say, would leave it in the land in the shape of labour, seed, tillages, &c. I am also of opinion that the payments of interest to the defendants amount to a direct contract to pay them the amount. The defendants are, therefore, entitled to make the deduction.

Hodding.

Smith & Wilmer.

[GUILDHALL.]

MATHEW, J., *without a Jury.*

KELLY v. LONDON & STAFFORDSHIRE FIRE
INSURANCE CO.

1833.

March 15.

THIS was an action to recover a sum of 10,000 dols. on a policy of fire insurance. The defence set up was that the defendants had not received the premium payable thereon, before the fire took place, and that consequently the policy had not attached.

In a policy of fire insurance, in the absence of a provision, that the policy is not to attach until payment of the premium, such a provision will not be implied.

The policy was signed and issued in Washington, in the district of Columbia, in America, on the 9th of June, 1880, by one Cole, the agent of the defendants there, and was effected upon wholesale grocery stock, at St. Paul's, in Minnesota, belonging to the plaintiffs, the risk to commence the 7th of June, 1880, at noon. Its material parts were as follows: (α). "In consideration of the sum of fifty dollars the said company doth hereby bind its capital stock to the assured." (β). "It is part of this contract that any person other than the assured who may have procured this insurance to be taken by this company shall be deemed to be the agent of the assured named in this policy, and not of this company, under any circumstances whatever, or in any transaction relating to this insurance." The broker employed by the plaintiff to effect the insurance was one Peasley. Peasley had frequently effected insurances with the defendants, received the premiums from the assured, and after deducting a 20 per cent. commission on the transaction, forwarded the balance to the defendants.

Cole handed over the policy to Peasley on the 9th of June, and Peasley at once forwarded it to the plaintiff, and received from him the premium. Peasley, however, did not pay over the premium to the defendants, until the 24th of August, 1880, though he had been previously requested by them so to do. The fire took place on the 23rd of August, 1880.

Waddy, Q.C., and Bremner, for the plaintiff.

Clarke, Q.C., and French, for the defendants.

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 KELLY
 v.
 LONDON AND
 STAFFORDSHIRE
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 CO.

The defendants' contention was, that on the true construction of the policy (1), the receipt of the premium by them was a condition precedent to its attaching; (2) the payment of the premium to Peasley was not a payment to the company.

MATHEW, J. There is no express provision in the policy that it shall not attach, until payment of the premium, and it cannot here be implied. Further, the defendants knew that Peasley had received the money, and they demanded it from him. Credit was given to him, as it had been in many transactions before. I find, as a fact, that the defendants intended that Peasley should receive the premium, deduct his commission, and hand over the balance. The object of the clause relied on probably is, to prevent the company being bound by representations of the broker.

Judgment for the plaintiff.

Ashurst, Morris, & Crisp.

Ayles & Ayles.

At the termination of the case Waddy, Q.C., referred his Lordship to an American text-book, May on Insurance, p. 152, 2nd ed., where, on the authority of a case of *Lycoming Fire Insurance v. Ward*, 90 Ill. 545, it is laid down that "the broker through whom the negotiations are had, and who is entrusted with the policy to be delivered, may receive the premium and bind the company, though he does not pay it over to them, notwithstanding a condition of the policy provides that the person obtaining the policy shall be regarded as the agent of the insured."

[GUILDHALL.]

MATHEW, J., and a S. J.

KNIGHT v. COTESWORTH.

1883.
 March 16, 17
 and 19.

Where an
 assured expects,
 but is not certain,
 that goods will come by a particular ship, the name of such ship is not a material fact the
 non-disclosure of which prevents the policy from attaching; nor in such a case is there any
 usage of underwriters at Lloyd's compelling the assured to disclose it.

THIS was an action on a policy of insurance to recover 100*l.* from the defendant in respect of a total loss of a cargo

of petroleum shipped on board the *Constantine* on a voyage from New York to London.

The principal defence was, that the policy had never attached, owing to the non-disclosure by the plaintiff to the underwriters, of whom the defendant was one, at the time of effecting the insurance in question, of the name of the carrying ship.

The plaintiff was a merchant in London, and in the month of June, 1881, he entered into an arrangement with Messrs. Recknagel & Co., in New York, that the latter should buy in America, and consign to the plaintiff for sale in the United Kingdom, petroleum, on joint account and at joint risk. Recknagel & Co. chartered vessels for these consignments, and informed the plaintiff in London of purchases and charters, and the plaintiff thereupon effected insurances upon the consignments by open policies, "per ship or ships."

On the 6th October, 1881, the plaintiff received a telegram from Recknagel & Co., informing him that they had bought 7,000 barrels of petroleum on joint account, and had chartered at New York the *Pride of the Ocean* to convey the same, provided the plaintiff could insure the cargo at a suitable rate of premium. Upon the receipt of this telegram, the plaintiff, through his broker, effected an insurance upon petroleum from New York to London, by an open policy (the one now in suit) for 7,500*l.*, "per ship or ships;" and no mention was made to the underwriters of the *Pride of the Ocean*. After the policy was effected on the 6th October, Recknagel & Co. cancelled the conditional charter of the *Pride of the Ocean*, and chartered the *Constantine* to carry the cargo referred to in the telegram. On October 7th, they telegraphed to the plaintiff to this effect, requesting him to substitute the *Constantine* for the *Pride of the Ocean* in the insurance. The plaintiff took no further steps with regard to the insurance, but telegraphed back, "have arranged insurance." On the 22nd March, 1882, the *Constantine* was declared a lost ship. The *Pride of the Ocean* was an unclassed ship, but admittedly a seaworthy vessel.

C. Russell, Q.C., Cohen, Q.C., and F. Hollams, for the plaintiff.

Butt, Q.C., and J. G. Barnes, for the defendant.

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KNIGHT

F.

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The plaintiff stated that he was in the habit, under the arrangement with Recknagel & Co., of effecting insurances with reference to particular shipments from New York, but, as there was always uncertainty as to the ship which would bring the shipment, he invariably insured "per ship or ships." That the first intelligence he received from New York as to actual shipment, as a rule, was upon receipt of the invoice, though occasionally he received a telegram informing him of shipment, and that he declared upon the policies within a few days of the receipt of the final invoice. He also stated that he knew nothing about the *Pride of the Ocean*, except that she was in the petroleum trade.

The defendant's contentions were:—

(1.) That the policy in suit was effected upon a specific shipment by a known ship, and that at the time the policy was taken out, it was known to the plaintiff that the *Pride of the Ocean* was the ship intended to bring the consignment to England, that this should have been disclosed to the underwriters, and that the non-disclosure of it was the concealment of a material fact which prevented the policy from attaching.

(2.) That where, as here, the plaintiff knew the name of the ship by which he expected that, or there was a probability that, the goods would come, there was a usage at Lloyd's by which he was bound to disclose such name.

In support of this contention, several underwriters of experience were called, who stated that, according to the usage and practice of underwriting business, the "ship or ships" policy when used by an assured, amounted to a representation by him that the name of the vessel, by which the insured goods were coming, was unknown to him. They further deposed that if there was an intention to charter a particular vessel, or a probability that a particular vessel would be chartered, the name should be disclosed to the underwriters, and that the usual form of policy where there was uncertainty was "per ship A., or ship or ships," and that it was material that the name of a ship, under such circumstances, even though unobjectionable, should be disclosed to the underwriters that they might distribute the risks.*

* It was also contended at the trial that the date of this shipment showed that the policy in suit had been exhausted by declarations

made on previous shipments, but it has not been thought useful to report the case on this point.

MATHEW, J. The defendant resists this claim on the ground that there has been a concealment of a material fact by the plaintiff. That would be a defence if made out. A material fact is one which, if known to the underwriters, would reasonably have induced them to refuse the risk, or else require a higher premium. To see whether the fact not disclosed here was a material one or not, you must look to the circumstances existing at the time this policy was effected, and not to what happened afterwards." His Lordship, after stating the facts and evidence, proceeded: "Does, or does not, the underwriting of a 'ship or ships' policy mean, that the underwriter is willing to waive all enquiry as to the ship, and willing to take any seaworthy risk? It is contended that it is material in underwriting business that the name of the vessel should be disclosed to secure a proper distribution of risks. You must consider whether this commends itself to you as men of business.

"Next, apart from the question of materiality, is there any usage at Lloyd's which entitles the defendant to the disclosure of the name of the ship in such a case?" His Lordship here referred to the evidence as to usage, and continued: "The difficulty in dealing with evidence as to usage is, that juries have to distinguish between a man's opinion and his actual experience. The best test to apply in such cases is, to ask a witness whether he can give, or knows of, an instance of any dispute of this kind in which the usage he contends for was recognized, and no instances of the recognition of such usage in any such cases was given here."

His Lordship left the following questions to the jury:—

- (1.) Was it material to the risk that the name of the *Pride of the Ocean* should be disclosed when this insurance was effected?
- (2.) Was the assured bound to disclose the name of the *Pride of the Ocean* by the usage and practice of underwriters at Lloyd's?

The jury answered both the questions in the negative.

Hollams, Son & Coward.

Walton, Bubb & Walton.

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As to the principles which regulate the disclosures which must be made by an assured to an assurer, and as to the admissibility of expert

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evidence on the question of the materiality of a particular fact, see the judgment of Lord Mansfield in *Carter v. Boehm*, 1 S. L. C. 550, 8th Ed.

In *Lynch v. Hamilton*, 3 Taunt. 37, one of the jury asked the question whether a policy could legally be effected on "ship or ships" without naming them if they were then known to the assured? Mansfield, C.J., said, that it had never yet been decided, that a policy was void on that ground alone.

Mansfield, C.J., in his judgment says, that the Court do not decide the point that a person cannot insure on "ship or ships" when he knows on board what ship his goods are laden, though the jury thought that was a proper ground for a nonsuit.

[GUILDHALL.

WATKIN WILLIAMS, J., and a C. J.

NEGUS v. JONES.

1883.
March 17.

Bequest to a married woman of real and personal property "for her sole and absolute use and benefit," held sufficient to create a separate estate.

THIS was an interpleader issue, to try, whether certain goods seized by the defendant, an execution creditor of Henry Negus, were the property of the plaintiff in the issue, Maria Elizabeth Negus, as against him.

In 1867 the plaintiff married Henry Negus, and upon their marriage they went to live with her father, Richard Francomb. On December 13th, 1869, Richard Francomb made his will in these words: "I leave to my daughter Maria Elizabeth, wife of Henry Negus, all my property, real and personal, for her sole and absolute use and benefit." On the 16th December, 1869, Richard Francomb died. The property left by the will consisted of certain cottages, in one of which the Neguses had lived with Richard Francomb in his lifetime, and in which they had continued to live, and were living, at the date of trial, and certain furniture in that house, the right to which furniture was the question upon this issue.

It was proved that the furniture in the house at the time of the seizure, was the same as had been there in Richard Francomb's lifetime. That, the plaintiff in the issue had nothing to do with her husband's business, and that she had always collected the rents of the cottages (of which there were three or four) herself, though she had sometimes put the money into a common purse to pay household expenses. She

also stated, that she had never given any of the furniture in the house to her husband, and that he had brought none into the house.

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Waddy, Q.C., and *H. Manisty* for the plaintiff in the issue.

Dawson Yelverton for the defendant, contended that the words in the will were not sufficient to create a separate estate in the wife (*Gilbert v. Lewis*, 1 De G. J. & S. 30), and that even if they did confer on her an absolute estate she had lost the *jus disponendi* by her relations with her husband (*White and Tudor's Leading Cases in Equity*, vol. i. pp. 528, 529, 5th Ed.).

WILLIAMS, J., directed the jury, that the effect of Richard Francomb's will, was to bestow on the claimant the absolute right to the devised property independently of her husband, and the only question for them was, whether Mrs. Negus, living as she did with her husband, in what was unquestionably her house at first, and mixing her monies to some extent with his, intended to, and did, relinquish her property in the goods in question to her husband, so that they became his.

The jury found that the goods were the property of the plaintiff in the issue.

W. A. Smith.

Wood & Wooton.

As to what words are sufficient to create a separate estate in the wife, see *White & Tudor's Leading Cases in Equity*, vol. i. p. 561 (5th Ed.), and the cases there collected.

[GUILDHALL.]

MANISTY, J., *without a Jury.*

SCARLETT *v.* HANSON.

1883.

March 19.

In this action the plaintiff, who was a judgment creditor of one Thoumire, sought to recover damages against the sheriff of Middlesex; (1.) For neglecting to levy upon goods of the execution debtor; (2.) For making a false return of *fi. fa. nulla bona*. A Sheriff is not bound to seize an equitable interest under a writ of

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The plaintiff had obtained a judgment against Thoumire for 44*l.* 6*s.* 2*d.*, and on the 23rd December, 1881, a writ of *fi. fa.* was delivered to the sheriff, and on that day the sheriff's officer entered upon the judgment debtor's premises, but, on the following day, wrote a letter to the solicitor of the judgment creditor, stating that the execution was no good, as the landlord was in possession upon a distress for rent, and he could not levy, and on the same day he withdrew. It was admitted that at the time the execution was put in, Thoumire's premises, and all goods and chattels thereon, had been assigned: (a) By a mortgage of the premises by Thoumire, together with the trade and tenant's fixtures and goodwill of the business, to one Hamlyn; (β.) By a bill of sale, given by Thoumire to the Union Deposit Bank, over all furniture and effects (with a power to pay rent and tack it on to their security), to secure a debt of 95*l.* The landlord was paid out by the bill of sale holder on the 24th December. The question argued was, whether, Thoumire's interest in the goods being only an equitable one, the sheriff was bound to have seized the goods in respect of the equity of redemption.

Vaughan Williams (with him *Ogle*) for the plaintiff admitted that up to 1860 the sheriff had no power to seize an equity of redemption, but contended that Sect. 13 of the C. L. P. Act, 1860,* had altered the law in that respect; that the intention of that section was to give the execution creditor a benefit he had not before, and that it thereby provided for the seizing of the equitable interest of the debtor.

A. Cock (with him *C. C. Scott*) for the defendant pointed out that the words of the statement of claim were "There were within the bailiwick of the sheriff goods and chattels

* When goods and chattels have been seized in execution by a sheriff or other officer under process of the above-mentioned Courts (i.e., any one of the Superior Courts, or from the Court of Common Pleas at Lancaster, or the Court of Pleas at Durham), and some third person claims to be entitled under a bill of sale or otherwise to such goods or chattels

by way of security for a debt, the Court or a Judge may order a sale of the whole or part thereof, upon such terms as to payment of the whole or part of the secured debt or otherwise as they or he shall think fit, and may direct the application of the proceeds of such sale in such manner and upon such terms as to such Court or Judge may seem just.

belonging to the debtor." It was admitted that this was incorrect. The title to the goods was in other persons. [*Vaughan Williams* asked leave to amend, but the question as to amendment was reserved.] He argued further, that there was no duty in the sheriff, when he found the legal estate in goods vested in persons other than the execution debtor, to seize. He was not bound to seize an equity. The procedure to realize an equity was to apply for a receiver. The sheriff could not even seize goods subject to a lien. He cited *Churchill on Sheriff Law*, p. 248; *Rogers v. Kenney*, 9 Q. B. 592; *Legg v. Evans*, 6 M. & W. p. 36; *Scott v. Scone*y, 8 East; *Salt v. Cooper*, L. R. 16 Ch. Div. 544, and as to the appointment of a receiver, *Hirst v. Smith*, 1 Colliers, Ch. Rep. 705.

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MANISTY, J. Prior to 1860, there is no doubt as to what the law was. The sheriff could only seize what he could sell, and if he had seized mortgaged goods, the only course was to order him out of possession, but no relief was given against him. The statute of 1860 (C. L. P. Act) enlarged the jurisdiction of the Court, and gave a new power to Judges to order a sale when mortgaged goods had been seized. It is contended that that imposed a new duty on sheriffs, and, if I understand the argument, it goes to the length of saying, that the sheriff is not a trespasser if he seizes goods belonging to a third party. That is going further than I am prepared to go. If such a duty had been intended to be imposed, it would have been done in express terms. This action is brought against the sheriff for not seizing goods of the execution debtor and for making a false return of *nulla bona*. It is admitted that he had no goods; therefore, under any circumstances, this action in this form is not maintainable. I doubt whether any form of action would make a sheriff liable for not seizing goods belonging to a third party. It is enough to say that, as this claim is framed, the action is not maintainable, and, thinking, as I do, that in no form would it have been maintainable, I am not inclined to make any amendment. There must be judgment for the defendant.

C. Butterfield.

Routh & Stacey.

It is worthy of notice, that, in a case of *Pearce v. Watkins*, 2 F. & F. 377, it was said by Lord Bramwell that a sale under this section of the

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Common Law Procedure Act would only be ordered upon special grounds, and as in that case the bill of sale holder opposed the sale, his Lordship refused to make the order, saying, that he did not see why the bill of sale holder should not nurse his security if he wished.

1883.

March 15.

Where a Company's bank received a money deposit from an applicant for shares in the Company, and placed it to a separate account kept for such deposits; the bank, having at the request of the Company, and on receiving notice of allotment to the applicant of the shares, in respect of which the deposit had been paid (which allotment was in fact invalid), transferred the deposit to the overdrawn general account of the Company, with knowledge that a meeting had been held with the object of winding up the Company, and that its reconstruction was contemplated, and in spite of notice from the applicant, not to part with the deposit without his authority: held that the bank was liable to repay the amount of the deposit to the applicant.

[GUILDHALL]

DENMAN, J.

GREENWELL v. NATIONAL PROVINCIAL BANK.

THIS was an action to recover a sum of 500*l.*, deposited with the defendants.

Petheram, Q.C., and *Israel Davis* for the plaintiff.

Charles, Q.C., and *Footo* for the defendants.

His Lordship reserved judgment.

The facts and arguments sufficiently appear from the judgment of the learned judge.

DENMAN, J. This was an action, brought by the plaintiff against the defendants, to recover a sum of 500*l.* paid into the defendants' bank by the plaintiff. The circumstances were as follows:—

In November, 1880, the plaintiff was appointed Assistant Secretary of "The Grosvenor Co-operative Stores Co., Limited," of which the defendants were the bankers. One Jones was a Director and Acting Secretary of the Stores Co., and one Martin was the Manager of the Baker Street Branch of the defendants' bank. On the 22nd of November, 1880, Martin was intimate with all the directors of the Stores, including Jones, and occasionally conversed with them as to the business and affairs of the company. On the 22nd of November, 1880, the plaintiff made an application for 600 preference shares in the Stores Company, and deposited in the defendants' Branch Bank in Baker Street 300*l.* for which he received the following acknowledgment:

"Receipt for deposit on application,

"The Grosvenor Co-operative Stores, Limited.

"Received this 22nd November, 1880, from H. S. Green-

April 3.

well three hundred pounds, *being a deposit of 10s. per share on 600 preference shares of 1l. each.*"

On the 13th December, 1880, the plaintiff applied for 400 more preference shares and received a similar acknowledgment for 200l.

The 500l., so paid in, was in accordance with instructions given by the Stores Company by letter of 10th August, 1880, placed by the Bank to a separate account headed "*Grosvenor Co-operative Stores Co., Limited, Preference Shares Account.*" This account, which had been opened on 12th August, 1880, in consequence of the letter 10th August above referred to, consisted of other similar deposits, which to a small extent, upon allotments being made to the depositors, were transferred to the general account. A separate pass-book was kept, headed "*National Provincial Bank of England, Debtor to The Grosvenor Stores, Preference Share Account,*" in which, on the Dr. side, were the names of the applicants for preference shares, with the amounts of their deposits, and on the Cr. side, entries, of which that relating to the plaintiff's deposits was a sample, which was, "*May 27, 1881, Greenwell transferred to ordinary account 500l.*" No allotment was made to the plaintiff in 1880. The Manager (Martin) of the Bank, in his affidavit in answer to a very long interrogatory, including the question, "*State whom you and the defendants treated as and considered entitled to the moneys deposited before and after allotment respectively ;*" swore as follows : "*I considered that the moneys paid on application were the property of the applicants, previous to allotment, and that on allotment they became the property of the company. I merely acted according to practice, and I had no special instructions.*" Down to March, 1881, nothing took place to alter the state of things. Early in that month, the Secretary of the Stores Company applied to the plaintiff, for a loan, in addition to one which they already owed him. He, on the 11th March, wrote to say, that he could not lend the money required unless the number of his shares was reduced (referring to the preference shares he had applied for in November and December). The Secretary on the 12th March, wrote, that the Directors had sanctioned the plaintiff's request, and that his application for 1000 shares was withdrawn and one for 500 substituted. Nothing more was done down to the 14th May,

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when the Stores Company issued a circular inclosing the heads of a scheme for the reconstruction of the Company, and ending thus: "If you wish to exchange your shares for an equivalent amount of shares in the new company please sign the annexed form, and interest will be paid at 5 per cent. from date of previous application." The plaintiff received a copy of this circular, but took no notice of it. The Manager, in his affidavit, admits that a reconstruction of the company was decided on, and, reading his answer with the question, I think it amounts to an admission that he knew of this decision before he did the act of which the plaintiff complains, viz., transferring his deposit money to the general account. On the 19th May the Company issued a circular calling a general meeting for the 25th to wind up the Company. The plaintiff had no notice of that meeting, but the Manager of the Bank knew beforehand that such a meeting was to be held. On the 21st, in consequence of the notice of the 14th as to reconstruction, the plaintiff gave the Stores Company fourteen days' notice to withdraw his application for 500 preference shares. The meeting to wind up was held on the 25th May, and a resolution to wind up the company voluntarily was then passed. On the same day, but whether before, or after, the resolution to wind up was passed does not appear, a board meeting was held, and 500 preference shares were allotted to the plaintiff. No notice of the winding-up resolution was sent to the plaintiff, but on the 26th May he received a notice of the allotment. He immediately consulted his solicitor, who at once wrote to the Stores repudiating the allotment, and to the defendants' Manager claiming a return of the 300*l.* and 200*l.* "paid by him on 22nd November and 13th December, 1880, to the Bank as deposits on application for preference shares, &c.," and desiring them "not to part with those amounts without his authority." After receipt of the solicitor's letters by the Stores Company and the Bank respectively, Jones, the Secretary of the Stores Company, wrote a letter, inaccurately dated the 25th May, to Martin, the Manager of the defendants' bank, as follows: "I beg to forward official letter requesting you to transfer 500*l.* from the preference share account to the general account, Mr. Greenwell's shares having been allotted to him. Our solicitor advises that we

shall not be able to get Mr. Chalk's (the plaintiff's solicitor's) letter to you withdrawn, but states that the Bank need not take any notice of it." Enclosed was (also wrongly dated 25th May), from Jones to Martin, as follows: "At a board meeting *held this day*, 500 one pound preference of this Company were allotted to Mr. H. S. Greenwell. Therefore, transfer 500*l.* from the preference to the general account." In pursuance of this letter, really written on the 26th, after the receipt of the plaintiff's of that date, the Bank, on the 27th, transferred the 500*l.* in question from the "preference" to the "general" account. At the time when this transfer took place the general account was overdrawn to an amount considerably beyond the 500*l.* transferred. The plaintiff's name was not placed upon the register of shareholders until some time later, viz. after the 31st May. The resolution to wind up was confirmed at a subsequent meeting, of which the plaintiff had notice, but which he did not attend.

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The above facts having been admitted, it was further admitted at the trial, that the allotment of the 25th May was an invalid allotment, but it was contended that there was no evidence that the defendants were aware of its invalidity, and that the plaintiff had no right, either in law or equity, to recover from the defendants. It was further admitted on the argument, that, when a depositor wished to withdraw his application for shares, the *usual* course was for him to take to the Bank an order signed by the Manager on behalf of the Stores Company, to which he would attach the Bank's receipt for the deposit, in exchange for which two documents the Bank could return the deposit money.

Upon these facts and admissions, it was agreed that the case should be argued before me, and that I should decide all questions of law and fact, and draw all proper inferences.

The case was argued by Mr. Petheram and Mr. Davis for the plaintiff, and by Mr. Charles and Mr. Foote for the defendants, and several authorities at law and in equity were cited. After examining these authorities I am of opinion that the case falls within the principles acted upon by V.-C. Kindersley, in the case of *Bodenham v. Hoskins*, 21 L. J. Ch. 864, and by the Court of Appeal in *Ex parte Kingston in re Gross*, 6 Ch. App. 632. In the former of those cases the plaintiff was the owner of an estate called "Rotherwas." He

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employed an agent and receiver, who paid the rents of the estate into the defendant's bank, to an account headed with the name of the estate, in order to distinguish it from his (the agent's) private account, which was overdrawn. He transferred the balance of the estate account to his own account. The plaintiff filed a bill against the bankers to refund this balance. The learned Vice-Chancellor found, upon the evidence, that the bankers were aware, that the money transferred was the produce of the rents of the plaintiff's estate, and made a decree against the bankers for the repayment of the amount. Mr. Bethell and Mr. Collins in arguing that case for the plaintiff, used arguments very apposite to the present case, which are reported as follows : "The separate heading was used expressly to show that the money was appropriated to particular purposes, and distinct from the private account of the individual. The principle acted upon by this Court was, that if the money was deposited with the bankers in separate accounts, and the bankers knew that the money received on one account was the property of any other person than their customer, they had no right to allow the blending of the two accounts. This principle arose upon the universal maxim of common honesty, that if you know the person with whom you are dealing is applying, for your benefit, money belonging to another, you are, in point of fact, auxiliary to that person committing a wrong upon another. The counsel for the defendants in that case (Mr. Stuart and Mr. Wright) in vain relied upon the case of *Foley v. Hill* (which was cited by Mr. Charles before me, as showing that there was in the present case no fiduciary relation between the plaintiff and defendants), and endeavoured to show, that upon the facts, it did not appear that the money there in dispute belonged to the plaintiff, and further contended that even if it did so appear, there was nothing to prevent them from applying it according to the orders of their customer, the receiver. The Vice-Chancellor, however, after carefully going through the facts of the case, and stating that he had at first entertained doubts, gave judgment as follows: 'I am constrained to arrive at the conclusion that the bankers, although I must exonerate them from any deliberate intention to commit a robbery or a fraud, still were not only parties to the simple act of the transfer, but were parties to the fraud,

in this sense, that they were aware of the circumstances which made it a fraud in Parkes (the receiver) to make the transfer to his private account, and being cognizant of that, and having been cognizant of it when the account was opened under the name of "The Rotherwas Account," and being cognizant of it throughout, they concur in a transaction the effect of which is, that for their own pecuniary benefit, an act is done by Parkes which is a fraud upon the plaintiff. Now according to the plain principles of a Court of Equity such an act can never be sustained; a party cannot retain the benefit which he has obtained from being a party to such an act with such knowledge of the nature of the act. I am under the necessity of decreeing the repayment of the 800*l.* by the defendants, the bankers, to the plaintiff.' " I am of opinion that every word of this judgment is *mutatis mutandis* applicable to the present case. The manager of the defendants' bank, who, for this purpose, is the bank itself (*In re Carew's Estate*, 31 Beavan, 38), himself candidly states that, until allotment, the deposits in respect of preference shares "were considered the property of the applicant." A separate account of them was kept, with a heading, "Preference Share Account," which was sufficient to distinguish them from the general account of the Stores Company, and also, I think, sufficient to show that it contained an account of deposits which, until allotment, were the property of the applicants, even without the admission of the manager that they were so considered. Before the bank transferred the 500*l.* to the general account, they had received notice from the plaintiff not to part with those monies without his authority. Yet with knowledge that a meeting with the object of winding-up the company had been held, and to put it most favourably for the defendants, without making any inquiry as to the result of that meeting, and with knowledge that a reconstruction of the Company was contemplated, they transferred monies to the general account of the Stores Company, which was overdrawn to a larger amount, "the effect of which," to use V.-C. Kindersley's words, would, if it could prevail, be "for their own pecuniary benefit." In these circumstances, though the defendants may have believed in the validity of the allotment, I think it clear that they made the transfer in question at their own risk, inasmuch as they

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ignored the rights of the plaintiff (which by the admission of the manager they considered to exist until allotment), and, after notice, made a transfer of his money in respect of an allotment which is admitted to have been invalid. Mr. Charles made an ingenious attempt to distinguish this case on the ground that the plaintiff, before he could have claimed the money back, according to usage, would have had to adopt the usual method of obtaining an order from the Stores Company and producing his receipts. I do not think that this argument can avail the defendants, inasmuch as they chose to make the transfer against his warning that he required the money back, and that they must not part with it without his authority, and they did so without making any inquiry as to the result of the winding-up meeting, which they knew was to be held on the 25th, two days before the transfer was made. I do not think it necessary to impute actual fraud to the defendants or their manager in order to entitle the plaintiff to succeed in such a case. It is enough if their conduct enabled their customer to commit a fraud upon the person for whose security the accounts had been kept separate, and so to confer upon the bank a pecuniary benefit, they having (to use the language of Sir Wm. Grant, M.R., in *Hill v. Simpson*, 7 Ves. p. 170) "shut their eyes against the information which without extraordinary neglect they could not avoid receiving." The judgments of James and Mellish, L.JJ., in *Ex parte Kingston in re Gross* seem to me to be entirely in accordance with that of V.-C. Kindersley in *Bodenham v. Hoskins*, and in one respect to go further than is necessary for the decision in the present case; for in that case the manager of the bank in his evidence said "that he did not believe that Gross was opening the account in question as county-treasurer, but understood that it was merely a separation of the account for his own convenience," which evidence James, L.J., summarily disposed of as follows: "He opened a distinct account and headed it 'Police Account,' which heading to my mind was as clear and distinct a statement that the monies paid into it were monies belonging to the county as if he had put the county monies into a strong box labelled 'County Monies.'" In the present case the heading of the account was, I think, evidence almost as cogent; but if any doubt could have been suggested as to

its cogency, the manager, instead of stating that he believed it was a separation of the account merely for the convenience of the Stores Company, states the moneys were considered to be those of the applicants until allotment. I have not thought it necessary to allude more particularly to the facts which are admitted, or to be fairly inferred from the answers to interrogatories and other documents which were in evidence. I am inclined to think that they might justify stronger inferences as to the extent of the Bank Manager's knowledge of the intentions of the Stores Company than those which I have drawn, but I do not feel confident that I should be doing justice to Mr. Martin in finding the facts as regards his knowledge more strongly than I have stated them above. But finding them as I do, I think that the plaintiff has established a case against the Bank entitling him to the repayment of the 500*l.*, and I give judgment for him for that amount with costs.

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Davis, Son & Co.

Wilde, Berger, Moore & Wilde.

[GUILDHALL.]

DENMAN, J., and a S. J.

STEIN v. COPE.

1883.
March 19.

IN this action, which was brought to recover the difference between the contract price and the price realised on a re-sale ordered by the Belgian Court of certain tobacco, the question arose as to the authority of the agent employed by the defendants under the following circumstances :—

The plaintiffs were dealers in tobacco at Antwerp, and in November, 1881, placed certain tobacco up for sale by auction, and appointed brokers to attend to the sale.

The brokers communicated the fact of the intended sale to the defendants, who were dealers in tobacco in Liverpool, and stated that it was to be without reserve.

The defendants instructed one Robinson, the manager of their cigar manufactory in Liverpool, to attend the sale ; his instructions were contained in the following letter :—

Where an agent of an English firm, instructed to buy goods at a foreign auction within a limited price, bought the goods by private contract before the auction, at less than the limited price ; it was found by the jury that this was within the scope of his authority.

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STEIN
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COPE."COPE BROS. & Co.,
"Tobacco Factors,
"Lord Nelson St., Liverpool,
"November 11th, 1881.

"MR. ROBINSON,

"*Re* Manilla Tobacco Auction, Antwerp. This will be held on the 24th, 25th November, 1881, and we shall be glad if you will arrange to be present. Mr. Wriedt will recommend you to a broker, who will act on our behalf. You are empowered to authorise the said broker to purchase upon our behalf the under-noted goods at prices not to exceed the respective rates marked ; terms to be immediate payment in cash. You can buy up to 500 bales of Havana tobacco of the Hamburg market.

"T. COPE.

"100 bales 1st Isabella cf. at 8s. 3d."

Robinson proceeded to Antwerp, but there was a conflict of evidence as to whether Robinson showed his letter of instructions to the brokers.

On the 23rd of November, prior to the auction, Robinson bought from the brokers by private contract 100 bales Isabella tobacco at 3s. 1d. per lb., it being agreed, that at whatever price the tobacco should be bought in at the auction by the brokers, it should be sold to Robinson at the above-named price of 3s. 1d. per lb. The tobacco was sold at the auction at 2s. 6d. per lb. The defendants having failed to pay for the tobacco, the plaintiffs obtained an order of the Belgian Court for its re-sale, when it fetched a price considerably below 3s. 1d. per lb., and it was to recover this difference that the action was brought.

Charles, Q.C. (with him *Pollard*), for the defendant submitted Robinson had no authority to buy save at the auction.

Cohen, Q.C. (with him *Kemp, Q.C.*, and *Rose Innes*), for the plaintiff. Robinson had a discretion to exercise, that even if his authority was actually limited by his instructions, yet he was held out as having authority.

DENMAN, J. The question is whether the contract of November 23 binds the defendants ; the primary contemplation of the letter containing Robinson's instructions was that

tobacco was to be sold at an auction. If the plaintiffs had no reason to suppose Robinson had authority, but treated him as a person having authority, and if they chose to deal with a person not held out, they must take their chance. His actual authority is given him by the document, but he may have been held out by the defendants as having a general authority to buy.

Had Robinson express authority to do other than bid within certain limits at a public auction; and if not express, had he implied authority, or was he held out as having authority?

The jury found that the transaction was fully within Robinson's authority, and the learned Judge gave judgment for the plaintiffs.

Rose, Innes & Co.

Rivington & Son.

LOPES, J., and a C. J.

HARRIS v. TENPANY.

1883.

April 11.

THIS was an interpleader issue to ascertain whether certain furniture and effects, in the possession of one Philipps, the execution debtor, were at the time of seizure the property of the plaintiff, as against the defendant, an execution creditor.

In the course of the case a question arose as to the validity of an agreement tendered in evidence relating to the hire of certain furniture and effects entered into between Harris and Philipps on the 17th January, 1881, under which Harris claimed to be entitled to the goods in question. The agreement stated that in consideration of the sum of 5*l.* to be paid by Philipps to Harris on each Monday during the continuance of the agreement, Harris let to Philipps, and Philipps hired from Harris "the several articles of furniture and effects belonging to the said Henry Myers Harris mentioned in the schedule hereto," and further "nothing in this agreement

Where the subject matter of an agreement of hiring was expressed to be "furniture, &c., mentioned in the schedule hereto," and the schedule was added by the plaintiff after execution; held, that this did not vitiate the agreement.

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HARRIS
v.
TENPANY.

shall affect the right to the property in the said articles of furniture and effects, which shall remain the sole and absolute property of the said Henry Myers Harris, and are only lent on hire, &c."

It appeared upon cross-examination of the plaintiff that the schedule referred to in the agreement had been added by the plaintiff some time after the execution of the agreement, whether before the actual seizure of the goods or not was uncertain.

McIntyre, Q.C. (with him *Ashton Cross*), for the defendant, submitted that the addition of the schedule to the agreement after execution was a material addition and alteration which vitiated the agreement. He cited *Sellin v. Price*, L. R. 2 Ex. 189.

T. Salter, Q.C. (with him *Bigham*), for the plaintiff, contended that there had been no material alteration in the agreement, but merely an addition of a schedule, which did not interfere with the effect of the document.

LOPES, J., in admitting it, said that in his opinion it was open to the plaintiff to show what the goods mentioned in the agreement were.

The jury found a verdict for the plaintiff.

Edward Johnson.

Perowne & Leggatt.

If it be open to show, by parol evidence, what the subject matter of a written agreement is, it would seem to follow that an addition in writing specifying such subject matter is not a material alteration. As to the rights and liabilities of parties to a written agreement, where one of them has altered it in a material part after execution, see the observations of Bramwell, B., in *Pattinson v. Luckley*, L. R. 10 Ex. 330.

LORD COLERIDGE *and a S. J.*PHELIPS *v.* HADHAM HIGHWAY DISTRICT BOARD.

1883.

April 17.

IN this action the plaintiff claimed an injunction to restrain the defendants or their agents from obstructing or allowing to be or continue obstructed a stream flowing into the river Stort, in Herefordshire, near a mill belonging to the plaintiff, so as to interfere with the passage of barges from the mill. There was, too, a claim for a mandamus to require the defendants to repair a bridge over the river Stort, and also a claim for damages for non-repair.

The provisions of the Highways Act, 1835, s. 109, as to local venue are abolished by the Rules of Court, 1875, Order 36, Rule 1. The provision of the above section as to notice of action, does not apply where the principal object of the action is an injunction.

R. T. Reid, Q.C., Kenelm Digby and Byrne for the plaintiff.

E. Clarke, Q.C., Wightman, Wood and Randolph for the defendants.

Clarke, Q.C., took the preliminary objection that under sect. 109 of the Highway Act, 1835 (5 & 6 Will. IV. c. 50), "every such action shall be laid and tried where the cause of action shall have arisen, and not in any other county or place," and that therefore the action could not be tried in Middlesex. He cited the observations of Lord Blackburn in *Garnett v. Bradley*, L. R. 3 App. Cases, at p. 968, for the general principle.

Reid, Q.C., referred to the Rules of Court, 1875, Order XXXVI., r. 1.

HIS LORDSHIP overruled the objection, and held that Order XXXVI., r. 1, applied.

Clarke, Q.C., then submitted that the notice of action required by s. 109 of the Highway Act, 1835, had not been given.

Reid, Q.C.—This action was originally commenced in the Chancery Division, and its principal object is an injunction, and therefore notice is unnecessary. He cited *Flower v. Local Board of Low Leyton* (L. R. 5 Ch. Div. 347, C. A.).

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PHILIPS
v.
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DISTRICT
BOARD.

HIS LORDSHIP held that the principle of that case was here applicable, and that no notice was therefore necessary.

Clarke, Q.C., then contended that no action will lie against a Highway Board for damage for non-repair. By s. 11 of 25 & 26 Vict. c. 61, the Highway Board of the district takes the place of the parish surveyor, as regards the vesting of property, and the rights and liabilities accruing thereout, and by s. 17 it is rendered liable to the same legal proceedings, and has the same powers as the surveyor of the parish; and in *Young v. Davies* (7 H. & N. 760; 31 L. J. Ex. 250) it was held that no action would lie against a surveyor of highways for damages, the result of an accident, for non-repair of the highway. See too *Gibson v. The Mayor, &c., of Preston* (L. R. 5 Q. B. 218). By 41 & 42 Vict. c. 77, s. 10, a special remedy is given to a person complaining of the non-repair of a highway.

Reid, Q.C., thereupon withdrew his claim for damages.

The action was ultimately compromised.

Paterson, Snow & Bloxam.

Rooks & Co.

LOPES, J., and a C. J.

BRINTON v. MADDISON.

1883.

April.

A trustee appointed by the creditors in composition proceedings to receive and distribute the debtor's assets is entitled to be put in funds in cash by the debtor in time to enable him to pay the instalments upon the date fixed for payment thereof. A right to seize and sell the debtor's property, given as security for the punctual payment of an instalment, does not upon default of punctual payment postpone the relegation of the creditors to their common law rights, till after the realization of the security.

IN this action the plaintiff sought to recover the sum of 98*l.* 19*s.* 10*d.* for goods supplied. The defendant admitted that the debt had been incurred, but set up as a defence a composition under section 126 of the Bankruptcy Act, 1869.

On the 28th May, 1882, the defendant presented a petition for liquidation, and a majority in value and number of the creditors, by an extraordinary resolution (to which the plaintiff was not a party); within the terms of s. 126 of the Bankruptcy Act

of 1869, resolved that a composition of 19s. 11d. in the £ should be accepted, to be payable by instalments at 3, 6, 9, 12, 15, 18, and 21 months from the 14th June, 1882, and that one Harvey should be appointed trustee to receive and distribute the assets. The punctual payment of the instalments to be secured to the satisfaction of two named creditors.

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This was done by a deed, dated the 14th June, 1882, by which the defendant assigned all his property to Harvey as trustee for the creditors, and by the terms of this deed the composition was to be paid direct to Harvey, who was thereby empowered to seize and sell all property of the defendant in case of any default made by the defendant in payment of the instalments. The first instalment of 2s. 6d. was payable on the 14th September, 1882.

On the 13th September, the defendant, who lived at Sunderland, sent a corrected list of creditors to Harvey in London, together with cheques dated the 14th September, drawn in favour of each individual creditor, the plaintiff among the number, for the amount of the instalments due to them on the 14th September. At the time these cheques were drawn the defendant had not sufficient money in the bank to have met them all. These cheques were returned to the defendant by Harvey in a letter received by him on the 15th September, which stated that the terms of the deed must be complied with, and asking him to send a banker's draft for the full amount payable to him (Harvey). On the 16th September the defendant paid 440l. into his account at the bank at Sunderland, and received a banker's draft for 629l. 4s. 2d., the full amount of the instalment, which he forwarded to Harvey, and which Harvey received on the 18th September.

Dividend warrants were sent by Harvey to each creditor the same day for the amount of their respective instalments, but the plaintiff declined to receive his, and brought this action for the full amount of his debt.

Willis, Q.C. (with him *Cyril Dodd*), for the plaintiff, contended that the liquidation proceedings were no answer to the plaintiff's claim in this action, because the instalment due on the 14th September had not been punctually paid, and he was therefore relegated to his ordinary common law right.

Pollard, for the defendant, argued that the trustee, having

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MADDISON.

been appointed by the creditors, was their agent, and not the debtor's, and could give time to the debtor on the creditors' behalf. [*Willis, Q.C.*, admitted that Harvey was the creditors' agent to receive and distribute the money, and that on the authority of *Ex parte Waterer*, 43 L. J. Bank. 25: 22 W. R. 426, the defendant could not be responsible for any irregularity of Harvey's, but submitted that the defendant was bound to put him in funds in time for him to make due payments.]

Pollard then argued, that by the terms of the composition deed, the trustee was entitled, and was bound to have seized and sold the debtor's property upon default of punctual payment, and therefore that he had money, or its equivalent, in his hands on the 14th; and farther, that the creditors had chosen to take a security instead of an action at law upon the non-payment of the composition punctually, and till the security was exhausted, they could not be remitted to their ordinary common law right to bring an action. That in any case there had been no such default by the debtor as could entitle the plaintiff to bring an action. He cited *Ex parte Ortelli, Re Shelley*, 45 L. T. N. S. 799.

LOPES, J.—I am against you. The trustee ought to have been put in funds in cash by the 14th September, and for his default in not doing this the defendant must suffer.

Judgment for the plaintiff for 98l. 19s. 10d. without costs.

Rooks & Co.

Bell, Broderick & Gray.

In *Edwards v. Coomb*, L. R. 7 C. P. 519, and *In re Hatton*, L. R. 7 Ch. App. 723, the Court decided that the creditor might sue upon default of punctual payment of an instalment due, but in these cases no payment or tender of the instalment had been made before action brought.

In *Ex parte Peacock, re Duffield*, L. R. 8 Ch. App. 682, the Court of Appeal, where no tender was made owing to a mistake in a point of law of the debtor's advisers, refused to interfere. Mellish, L.J., saying, "It is no doubt true that in the case of *In re Hatton (ubi supra)*, we guarded ourselves by saying there might be cases where, by possibility, relief might be given to the debtor, but I am rather disposed to think, upon consideration, that such relief must be granted upon some act done

on the part of the creditor which makes it inequitable that he should enforce his strict legal rights; if, for instance, he had done anything tending to show that he was not ready to receive the composition, if tendered, that might be a circumstance to be taken into consideration, but there is no evidence in this case that between the time of the resolutions and the time that the composition ought to have been paid the creditor did anything whatever."

1883.

BRINTON
v.
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SMITH, J.

LOCKHART v. WEBSTER.

1883.

May 1.

THIS was an action to recover 150*l.* claimed as due under an agreement of compromise, of a previous action brought by the plaintiff against the defendant. The terms of the compromise were:—"The defendant to pay 150*l.* in full of all claim for rent, and to give up possession of the premises 17, Ely Place, to the plaintiff, on or before the 24th instant, but Messrs. Bridden & Co. are not to be required at the same time to quit the rooms they now occupy on the second floor, the plaintiffs to receive from Messrs. Bridden & Co. the rent to accrue from and after the 24th of June. None of the fixtures and fittings put up by the defendant are to be removed by him, but the plaintiff to settle Ravey's claim against the defendant. On the above payment being made and possession given to the plaintiff, the defendant to be released from his agreement to take a lease of the premises, all further proceedings in this action to be stayed, and each party to pay his own costs. Dated the 3rd of June, 1882."

Where an action was compromised upon terms, one of which was that the defendant should pay the plaintiff £150, and another that the plaintiff should pay a third party's claims against the defendant. Held, that the payment of the third party's claim by the plaintiff was not a condition precedent to the plaintiff's right to sue for the £150.

In pursuance of this compromise the action was stayed, and the terms carried out by the plaintiff, save that it was admitted that Ravey's claim had not yet been paid by the plaintiff, who, however, stated that Ravey had expressed his willingness to take payment out of the 150*l.* when paid by the defendant.

Gore for the plaintiff.

C. H. Turner for the defendant submitted that this action

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LOCKHART
v.
WEBSTER.

would not lie till the plaintiff had satisfied Ravey's claim, or, at least, averred his readiness and willingness to do so; and this he had not done. The two acts were to be concurrent. He cited *Atkinson v. Smith* (14 M. & W. 695); *Bankart v. Bowers* (L. R. 1 C. P. 484); *Duthie v. Hilton* (L. R. 4 C. P. 198).

SMITH, J., ruled that the consideration was the compromise of pending litigation, and that the settling of Ravey's claim was not a condition precedent to the plaintiff's right to bring this action, and gave

Judgment for the plaintiff.

Hasting, Son, & Ellis.

W. S. Webster.

As to the *ex post facto* conversion of a condition precedent into an independent agreement, where the party seeking to set up the defence of an unperformed condition precedent, has had the benefit of a part performance of the contract, see *Graves v. Legg*, 9 Ex. 709; 23 L. J. Ex. 228; *Behn v. Burness*, 3 B. & S. 751; 32 L. J. Q. B. 204; *Pust v. Dowie*, 5 B. & S. 20; 32 L. J. Q. B. 179. It would seem, that it is on the principle of estoppel, that a party cannot set up the non-performance of a condition precedent in such cases.

LORD COLERIDGE *and a S. J.*

1883.

May 2.

MITCHISON v. THOMSON & OTHERS.

In an action for the recovery of land for breach of a covenant to repair, relief will be granted under the Conveyancing Act, 1881, although the premises are in a very dilapidated condition, and the relief was not claimed by the pleadings

THIS was an action to recover possession of certain lands and houses on the ground of a breach of covenant to keep the same in repair. The lease contained a proviso for re-entry upon breach of any of the covenants therein.

The evidence showed that the houses (forty-six small tenements) had been in a very dilapidated condition for a considerable period, and that it would cost 600*l.* or 700*l.* to put them in proper repair. Relief under the Conveyancing Act, 1881, c. 14, s. 2,* had not been claimed by the pleadings.

* "Where a lessor is proceeding such a right of re-entry, or for-
by action or otherwise, to enforce feiture, the lessee may, in the

J. J. Powell, Q.C. and *A. T. Lawrence* for the plaintiffs. 1883.
Houghton, Candy, and Pain, for different defendants, re- MITCHISON
 ferred to the above subsection of the Conveyancing Act, 1881, v.
 and cited *Quilter v. Mapleson* (L. R. 9 Q. B. D. 672, C. A.) THOMSON AND
 OTHERS.

LORD COLERIDGE. I must act on that subsection.

HIS LORDSHIP gave judgment for the plaintiffs, but ordered the same not to be enforced, if the defendants should (1) give security within a fortnight to the satisfaction of the Master that they would put the premises in repair; (2) within four months have the premises put in repair to the satisfaction of a person to be agreed upon by the parties, and, in case of difference, to be named by his Lordship. The defendants to pay all arrears of rent, and the costs of the action.

Liberty to apply.

S. W. Johnson & Son.

A. G. Ditton.

LORD COLERIDGE and a S. J.

GRAVES v. MASTERS.

1883.
 May 2.

THIS was an action to recover possession of certain proof engravings, or their value. The plaintiff had a shop and gallery for the sale of pictures and engravings, and one Harris was a cashier in his employment. In the year 1879, one Pringle, at Harris's invitation, used to visit the plaintiff's

A sale of engravings by a cashier in the employment of a picture engraver, is not a sale within the ostensible authority of the cashier.

lessor's action, if any, or in any action brought by himself, apply to the Court for relief; and the Court may grant or refuse relief as the Court having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances, thinks fit; and in case

of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or otherwise, including the granting of an injunction to restrain any like breach in the future, as the Court in the circumstances of each case thinks fit."

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GRAVES
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MASTERS.

gallery, and there, in company with Harris, inspect the pictures and engravings, and agree with Harris to buy such ones as suited him at trade prices. The engravings were conveyed by one of the plaintiff's porters to the place named by Pringle, and the prices were paid by Pringle to Harris, who appropriated the money to his own use. It was admitted that Pringle had no notice of the system of fraud practised by Harris on the plaintiff; and also admitted that Harris had no actual authority to sell the engravings. Pringle had bequeathed the engravings to the defendant.

Talfourd Salter, Q.C., and C. E. Jones, for the plaintiff
Finlay, Q.C., and Gore, for the defendant.

The jury were discharged by consent, and the case reserved for

May 7.

Further consideration.

Talfourd Salter, Q.C.—It is only by a contract that the plaintiff can have been divested of the property: and here it is admitted that Harris had no actual authority to sell; nor is there any act on the part of the plaintiff by which he held out Harris, who was merely a cashier in his establishment, as having authority to sell. He cited *Cundy v. Lindsay*, L. R. 3 App. Cas. 459. Here there were no intention on the part of Harris to make a contract on behalf of Graves: Harris had throughout the *animus furandi*. Here, too, there was evidence to support an indictment for larceny: *Rex v. Longstreet*, 1 Moody's Crown Cases, 187; *Reg. v. Shepherd*, 9 C. & P. 121.

Finlay, Q.C., for the defendant.

The plaintiffs are responsible for what takes place on their premises: Harris had an ostensible authority to sell, and the plaintiff must be bound by his acts: *Barratt v. Deere* (1 M. & M. 200; and *per Maule, J.*, in 5 Ell. & B. 539); *Finch v. Boning*, L. R. 4 C. P. D. 143.

LORD COLERIDGE.—The plaintiff is entitled to succeed; though in these cases, where one of two innocent parties must suffer for the wrongful act of a third party, one would like that the person in whose employment the wrongdoer was, should suffer.

To bind the principal in this case, there must be a contract either with him or with his agent. Here there was admittedly no contract with the principal himself. How then is he bound by the contract with Harris? He would only be bound if it was within the scope of Harris's authority, or the plaintiff had either directly or indirectly held Harris out, and allowed him to be considered as his agent. Here there was no authority to sell in point of fact, nor did the sale come under the scope of Harris's authority. But it is said that a sale by any one in the establishment binds the plaintiff; but I do not think the cases quoted by Mr. Finlay carry him far enough: *Barratt v. Deere*, is broadly distinguishable. It was not a case of authority to contract, but of payment, and the payment was made to a person apparently clothed with authority to receive it. I adhere to the principle as stated by myself in *Finch v. Boning*.

Here Harris was a cashier. He went out of his place and showed a person things in the gallery without the plaintiff's knowledge, and in breach of his authority. This cannot bind the plaintiff as a holding out of Harris as his agent.

Pearpoint & Lock.

J. C. Cox.

See *Richardson v. Cartwright*, 1 C. & K. 328, where the defendant was held liable on a contract made by his *foreman*; and *Summers v. Solomon*, 7 E. & B. 879; 26 L. J. Q. B. 301, where the defendant was held liable for goods supplied to his *shopman*; see, too, Chitty on Contracts, p. 193—4, 10th ed., on the difference between general and special agents.

HUDDLESTON, B.

COOMBS v. COOK.

1883.

May 3.

THIS was an action to recover a deposit of 42*l.*, which had been paid by the plaintiff in part payment of a sum of 420*l.*, the price of certain land sold by auction on the 1st of July,

The word "shop" in a conveyance, does not include a tavern.

1883.

COOMBS

v.
COOK.

1882. There was a counterclaim for specific performance, and the question at issue really was whether a "shop" included a "tavern."

The land in question was part of a building estate which had been conveyed to the defendant by an indenture of the 17th of February, 1882, which contained a covenant on the part of the defendant, "with the exception of shops which might be built fronting the Leigham Valley Road, not to use any house to be erected on any part of the hereditaments thereinbefore expressed to be thereby granted for any other purpose than that of a private dwelling-house only; and further, a covenant not to do nor suffer anything to be done upon any part of the said hereditaments thereinbefore expressed to be thereby conveyed, which might be a nuisance to the conveying parties or to the surrounding neighbourhood."

The defendant put up parts of the property for sale in lots. The property purchased by the plaintiff was Lot 1, and was described in the Particulars of Sale as "a valuable tavern lot."

The fourth condition of sale was in these terms:—The trade of an innkeeper, victualler, or retailer of wine or spirits or beer, is not to be carried on except on Lot 1.

Lot 1 fronted the Leigham Valley Road.

Morton for the plaintiff. A tavern is something more than a shop. It is a place of entertainment, as well as a place for the sale of liquor. He referred to the definitions in Skeat's "Etymological Dictionary" and Webster's "Dictionary;" *The London & Suburban, &c., Co. v. Field* (L. R. 16 Ch. D. 645, C. A.); and the definition of "inn" in 26 & 27 Vict. c. 41, s. 4.

The plaintiff cannot be compelled to buy a lawsuit. If the matter be one of doubt, the Court will not compel a purchaser to complete.

Charles, Q.C., and *Maidlow*, for the defendant.

As to buying a lawsuit, see *Beioley v. Carter*, L. R. 4 Ch. App. 230.

It is enough to be able to say of the thing to be erected that it is a shop. The fact that a tavern is something more

than a shop is immaterial. See the judgment of Cotton, L.J., in the *London & Suburban, &c., Co. v. Field* (*ubi supra*).

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COOK.

HUDDLESTON, B.—I have no doubt in this case. The plain intention of the parties must be given effect to. The original grantor intends to lay out his land for particular purposes. He stipulates for certain uses, and only those uses can be made of it. The property is to be wholly used for private houses. Nothing must be done upon any part of it which is a nuisance (*e.g.*, houses of ill-fame, skating-rinks, and the like). One part, however, for general convenience is allowed to be used for shops, which I understand to mean drapers', butchers', and greengrocers' shops, &c., to supply the neighbourhood with their daily wants. A tavern would not come within the definition of shop. It is true that beer is sold there. But a tavern is also a house of entertainment, and travellers have a right to food and refreshment there.

I think that upon the estate generally private houses only were to be allowed, but that along this frontage there might be shops of an ordinary character, but not a tavern.

HIS LORDSHIP gave judgment for the plaintiff for the recovery of the deposit, with interest thereon, and the costs of investigating the title, but said that, on the authority of *Bain v. Fothergill*, L. R. 7 H. L. 158, no damages could be recovered.

Barnard & Co.

Thomson & Brooks.

FIELD, J.

NORMAN v. BOLT.

THIS was an action against a surety on a bond given in pursuance of section 7 of the Bankruptcy Act, 1869.

At the end of the year 1879 the plaintiff had taken out a debtor's summons against one Craven, the proceedings on which were stayed on a bond being executed by Craven and two sureties, of whom the defendant was one, on the

1883.

May 8.

The pursuit of a counterclaim is a "proceeding continued" within the meaning of the surety's bond given in pursuance of s. 7 of the Bankruptcy Act, 1869. A reservation by a creditor of his rights against a surety may be by parol.

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1st day of March, 1880, the condition of which was as follows :—

“Now, therefore, the condition of this obligation is such, that if the above bounden Craven or [his sureties] shall on demand well and truly pay or cause to be paid to Norman, his attorney or agent, such sum or sums as shall be recovered against the said Craven by any proceedings taken or continued within twenty-one days from the date hereof in any competent Court by the said Norman for the payment of the debt claimed by him in the said petition or debtor's summons, together with such costs as shall be given to the said Norman by such Court, the obligation shall be void, otherwise it shall remain in full force.”

On the 14th day of February, 1880, Norman had delivered his counterclaim in an action of *Craven v. Norman*, by which he claimed the amount in respect of which he had taken out his debtor's summons.

The reply in the action of *Craven v. Norman* was delivered on the 7th day of April; the rejoinder on the 9th.

On the 1st day of July Norman obtained judgment on his counterclaim for 51*l.* 17*s.* 8*d.*

On the 8th day of November, 1881, Norman and Craven having agreed that the debt should be paid by instalments, a consent order was drawn up to that effect. Norman, however, stated by word of mouth to Craven that he reserved his rights against the sureties.

Addison, Q.C., for the plaintiff.

T. T. Paine, for the defendant, contended :—

(1.) That the surety was discharged because the pursuit of the counterclaim was not a “proceeding” within the meaning of the bond, and that no step had been taken by Norman within twenty-one days after the execution of the bond;

(2.) That time was given to the principal debtor, and the reservation of rights against the surety was inoperative, being by word of mouth. He cited *Ex parte Harvey*, 23 L. J. Bky. 26; *Overend v. The Liquidators of the Oriental Financial Corporation*, 7 E. & I. App. 348.

HIS LORDSHIP ruled that the counterclaim was a proceeding within the meaning of the bond, and that the reservation of

rights against the surety prevented his being discharged, and that such a reservation might be by word of mouth, and gave judgment for the plaintiff.

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Boyce.

Neither the making a composition with the debtor, nor the making a binding agreement with the debtor to give him time, will discharge the surety, if the creditor's rights against the surety are reserved. See the expositions of the law by Lord Eldon in *Ex parte Glendinning*, Buck. 517, and by Baron Parke in *Kearsley v. Cole*, 16 M. & W. 128. Even a release of the debtor will not discharge the surety, if there be a reservation of rights against the surety; but the release will be construed as a covenant, on the part of the creditor, not to sue the debtor. See *per* Lord Hatherley in *Green v. Wynn*, L. R. 4 Ch. App. 204—206; and in *Webb v. Hewitt*, 1 K. & J. 442; and *per* Mellish, L.J., in *Nevill's Case*, L. R. 6 Ch. App. 43.

Of course, if the agreement to give time be not *binding* the surety will not be discharged, even if there be no reservation of rights against him, *Tucker v. Laing*, 2 K. & J. 745; *McManus v. Back*, L. R. 5 Ex. 65. There has been at least an apparent conflict of judicial opinion as to whether the reservation of rights against the surety must appear on the face of the agreement of composition, or agreement giving time; and if it does not so appear, whether parol evidence is admissible to prove such reservation. On the one hand, see *per* Lord Eldon, in *Ex parte Glendinning* (*ubi supra*), and *Cocks v. Nash*, 9 Bing. 341; and on the other, *Wyke v. Rogers*, 21 L. J. Ch. 611; *per* Turner, L.J., in *Ex parte Harvey*, 23 L. J. Bank. 26, and *Jones v. Lewis*, 4 B. & C. 515, n. (a). It is submitted that the ordinary rules as to the admissibility or non-admissibility of parol evidence, when there is a written document, must be applied, and that although the *weight* of such evidence may not be great, yet, if the reservation of rights against the surety is not *inconsistent* with anything on the face of the instrument, then the mere fact that the Court would, in the absence of evidence, hold as a conclusion of law that the surety was discharged, will not render the evidence inadmissible.

WATKIN WILLIAMS, J.

1883.

May 9.

MURRELL v. FYSH.

Under a covenant to indemnify against all actions and claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants, are recoverable as damages.

THIS was an action to recover the sum of 210*l.* 0*s.* 3*d.*, paid under an award made in an action of *Raffenel v. Murrell and Others*. By a lease dated the 1st September, 1877, one Rawlins became tenant to the Raffenels of certain premises, Nos. 1 to 12, Lisbon Street, for a term of sixty years. This lease contained the usual covenant to repair. On the 15th October, 1877, Rawlins assigned the lease by way of mortgage to the plaintiffs. On the 5th November, 1878, the plaintiffs, as mortgagees, entered into an agreement with the defendant to sell the premises to him for the unexpired residue of the term of sixty years: and the 6th clause in this agreement stated that from and after the 11th November, 1878, the purchaser (the defendant) would observe and perform all the covenants and conditions contained in the said indenture of lease on the lessee's part to be observed and performed, and would keep indemnified the vendors (the plaintiffs) from and against the observance and performance of the said covenants, and all actions and claims on account thereof. The purchase was to be completed by the 11th November, 1880.

On the 11th November, 1878, the defendant entered into possession of the premises and remained in possession till November, 1880; but before completion of the purchase and actual assignment of the lease to him, he assigned with the plaintiff's knowledge all benefit under the agreement of the 5th November, 1878, to one Goldman, but in May, 1881, Goldman being anxious to have the lease assigned, the plaintiffs at the defendant's request executed an assignment of the lease to one Abrahams on the 14th November, 1881. Shortly after this, the premises having fallen into a bad state of repair, a claim was made by the lessors against the present plaintiffs, as assignees of the lease, for breaches of the covenant to repair in the lease, and an action brought to enforce this claim, which was referred to an arbitrator. Notice of this action was given by the then defendant, the present plaintiff,

to Fysh, the now defendant, under Order XVI., r. 18, of the Judicature Acts, but he did not appear.

The claim in that action against the present plaintiffs was limited to the period between the 15th October, 1877, and the 14th November, 1881, when they assigned the lease to Abrahams. On the 5th July, 1882, the arbitrator made his award for 35*l.* and costs, amounting altogether to 210*l.* 0*s.* 3*d.* against the present plaintiffs, and their claim in this action was to recover under the covenant of indemnity in the agreement of the 5th November, 1878, the whole of the sum from the present defendant Fysh.

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Charles, Q.C. and *Bullen* for the plaintiffs.
Bosanquet, Q.C., and *Darling* for the defendant.

WATKIN WILLIAMS, J., said he was clearly of opinion that the whole amount paid under the award could not be recovered from the defendant, inasmuch as upon the face of it, it did not appear that it had no relation to the first 12 months before the agreement with the defendant to assign the lease to him.

Charles, Q.C., called the arbitrator (whose evidence was objected to, but admitted), who stated that the amount he had awarded was in respect of dilapidation covering the whole period from October, 1877, to November, 1881. It was ultimately agreed that the damages, if any, for dilapidations in the defendant's time should be taken at 30*l.*

Evidence was then given by the plaintiffs to show that the claim in the original action of *Raffenel v. Murrell and Others*, was for 185*l.*, whereas 35*l.* only had been awarded.

At the close of the plaintiff's case *Bosanquet, Q.C.*, submitted that no case had been made out, as—

(1.) The award was not binding on the defendant at all, as he was not bound to appear, and had not appeared in the original action ;

(2.) The agreement to assign the lease to the defendant had been subsequently carried out in the deed of assignment to Abrahams, and was absorbed in that, and the deed alone could be looked at. That, at any rate, the costs of defending the original action could not be recovered in this action, as

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MURRELL v. FYSH.	<i>Charles, Q.C., cited Rolph v. Crouch, L. R. 3 Ex. 44.</i>

HIS LORDSHIP, after stating the facts and saying that in his opinion the plaintiffs were entitled to recover the 30*l.* for dilapidation during the defendant's tenancy, continued : " The questions I have now to determine are whether the plaintiffs were fairly and justly entitled to defend the original action, and whether the costs incurred by them in defending it were an approximate result of the defendant's breach of contract ? They were bound both in the interest of the present defendant and of themselves to see that they did not pay too much, and I answer both these questions in the affirmative. I do not however think that under the circumstances they are entitled to recover the whole of these costs. I have before me no materials which give me any assistance in arriving at a correct apportionment, but I think that two-thirds of the sum total is a fair amount for them to recover. There must be judgment for the plaintiff for 146*l.* and costs.

Solicitors for the plaintiff, *Yarde & Loader.*

Solicitors for the defendant, *Jennings & Son.*

As to the recovery in such a case of costs as damages, see *Hornby v. Cardwell*, L. R. 8 Q. B. D. 329, C. A., a very similar case—though there, as the official Referee found that the defendant in the original action, was entitled to be indemnified in respect of *all* the dilapidations, *all* the costs of defending the action were recovered as damages.

As to the circumstances under which, and the extent to which, the evidence of an arbitrator is admissible, see the judgment of Cleasby, B., in *Duke of Buccleuch v. The Metropolitan Board of Works*, L. R. 5 H. of L. Cas., at p. 432, and of Blackburn, J., in the same case, in the Ex. Ch. L. R. 5 Ex. 225.

STEPHEN, J.

SOLOMON v. DAVIS.

1883.

May.

THIS was an action by the holder against the acceptor of a bill of exchange.

Grantham, Q.C., and Mugliston, for the plaintiff.
Horne Payne, for the defendant.

HIS LORDSHIP reserved judgment, and the facts and arguments sufficiently appear therefrom.

STEPHEN, J.—The facts of this case were as follows:—David Israel drew a bill upon Edward Davis, who accepted it for the accommodation of Israel. This was denied on the pleadings, but having heard evidence on the subject, I find it as a fact. The bill was afterwards renewed at the request of Davis, the acceptor of the accommodation bill.

Before the bill became due Israel made a composition with his creditors. Solomon, as one of them, assented to the composition, which was 2s. in the 1l., and he recovered from Israel 7l. 10s. as the amount of the composition; he then sued Davis the acceptor for 100l. Davis tendered to him 92l. 10s. before action, and after action paid into Court 94l. 10s. in order to cover any amount which might be due for interest or expenses. Solomon proceeded with his action, and the question is whether, notwithstanding the fact that he has received on account of this 100l. bill 102l., he is still entitled to recover 7l. 10s. The contention at first sight appeared to me, as a similar contention appeared to Willes, J., in 1863, absurd in its statement; but reference was made to the case of *Jones v. Broadhurst* (9 C. B. 173), which was alleged to warrant it, and I reserved judgment till I could examine that and one or two other cases referred to, at leisure. Having done so, I am satisfied that *Jones v. Broadhurst* does not apply to this case at all, and I entertain some doubt whether *Cook v. Lister*, 13 C. B. N. S. 543, a later decision of the same Court, has not greatly shaken the authority of *Jones v. Broadhurst*, although *Jones v. Broadhurst* is cited as an

The rule that payment by the drawer of a bill of exchange to the holder, does not discharge the holder's claim against the acceptor, does not apply where the bill has been accepted for the accommodation of the drawer.

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authority in a still later case in the Court of Common Pleas, viz., *Thornton v. Maynard*, L. R. 10 C. P. 695, which passes over *Cook v. Lister* unnoticed.

Be this as it may, what *Jones v. Broadhurst* decides is, that in the case of a bill for value upon which the acceptor is the person ultimately liable, payment by the drawer or by an indorser to the holder does not discharge the acceptor because his liability is ultimate; the effect of such a payment is to make the holder liable to pay over out of what he recovers from the defendant the amount advanced by the person making satisfaction. The expression used in some of the cases is, that the plaintiff sues as "trustee" to that extent; whether the word trustee is used in the stricter or in the broader sense of the word, is a matter, since the Judicature Act, of no importance. This is the effect of the decisions in *Thornton v. Maynard*, and in *Agra Bank v. Leighton* (L. R. 2 Ex. 56).

The judgment in *Jones v. Broadhurst*, is, however, based upon the fact that the bill in that case was a bill for value, and it is repeatedly stated in the elaborate judgment, that it has no application to accommodation bills. This is clearly pointed out in *Cook v. Lister*. In that case Erle, C. J., and Willes, J., with whom Keating, J., agreed, laid down a doctrine as to bills of exchange which it is difficult to reconcile with *Jones v. Broadhurst*, although it seems to me to be sound sense. Willes, J., says it is elementary that the holder of a bill of exchange is entitled to no more than the amount of principal and interest due upon his bill; he is entitled to receive payment of the bill at maturity from some person interested in paying it, and, if it be not then paid, to interest and expenses, if any; this is the utmost claim that the holder of a bill of exchange has upon a party to the bill, and upon such claim being satisfied by any party to the bill the right of the holder ceases. Williams, J., took a narrower and more technical view of the subject which he based upon a consideration of the pleadings in *Jones v. Broadhurst*, but he points out that that case does not apply at all to accommodation bills, because in the case of such bills the drawer and not the acceptor is the person ultimately liable. He concludes his consideration of the case with these words which appear to me to be precisely in point in reference to the case before me. It seems to me that at all events where it appears

that the bill is an accommodation bill, even supposing the plaintiff, the holder, had no notice of the fact at the time he received the payment from the drawer, that payment must be taken in mitigation of damages, and that the plaintiff, the holder, can recover no more than the difference between the amount of the bill and that payment.

The relation between the various cases is no doubt somewhat intricate, but I think it may be shortly stated as follows :—

According to the view of *Jones v. Broadhurst*, *Agra Bank v. Leighton*, and *Thornton v. Maynard*, payment by the drawer is not a discharge to the acceptor whose liability is final, but if the holder receives payment in whole or in part from the drawer, and recovers from the acceptor, the holder must pay over to the drawer the amount which the holder had received from the drawer. This is because the drawer would otherwise have recourse against the acceptor, who would then be made to pay twice over, whilst the holder would be paid twice over.

The whole doctrine proceeds upon the supposition that the bill was given for value, but if it were to be applied to the case of an accommodation bill, it would work out thus:—An accommodation bill differs from a bill for value in the fact that the situation of the drawer and the acceptor are reversed. The drawer is ultimately liable, and the acceptor, if he is forced to pay the holder, has recourse against the drawer, and therefore the principle, which, in the case of a bill for value, requires the holder to sue the acceptor as trustee for the drawer as to so much of the bill as has been paid by the drawer would, if the principle could be applied at all, require the holder to sue the acceptor, if at all, as trustee for the acceptor as to so much of the bill as has been paid by the drawer. Thus, if Solomon could recover 100*l.* from Davis, he would, as to 7*l.* 10*s.*, be trustee for Davis, because Davis would have a right to sue Israel for the whole 100*l.* Israel ought not to be made to pay 7*l.* 10*s.* twice over, nor ought Solomon to get more in all than 100*l.* And these unjust results could be avoided only by Solomon's repaying to Davis the 7*l.* 10*s.* which he had recovered from him.

The doctrine of *Jones v. Broadhurst* applied to an accommodation bill would thus produce by an intricate and round-

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about method the result which is reached by a shorter and simpler method by the principle laid down in *Cook v. Lister*, that the doctrine in *Jones v. Broadhurst*, is not applicable to accommodation bills, but that in the case of such bills payment by the drawer is a discharge to the acceptor. Whether the view taken in *Cook v. Lister* is reconcilable with any part of the decision in *Jones v. Broadhurst* is a question which I need not discuss.

There must be judgment for the defendant with costs.

S. Solomon.

Harris & Godwin.

FIELD, J.

1883.

June 1.

WHITTICK v. MOZLEY.

The making of alterations in premises by the intended landlord under a verbal agreement to let: Held, not to be a part performance taking the case out of the Statute of Frauds.

THIS was an action for damages for breach of a contract to take a furnished house. To a defence pleading the 4th section of the Statute of Frauds, the plaintiff replied that there was a part performance.

On June 10th it was verbally agreed between the plaintiff and the defendant that the defendant should take a house for one year from July 16th then next, the plaintiff to make certain alterations in the house. These alterations, and certain other alterations, at the defendant's request, were made, and approved of by the defendant, being completed on June 24th. On June 27th the defendant refused to take the house.

C. E. Jones, for the plaintiff, cited *Donellan v. Read*, (3 B. & A. 899), and referred to the notes to *Lester v. Foxcroft* in *White & Tudor's L. C.* vol. ii. p. 828.

French for the defendant.

FIELD, J.—The Statute of Frauds affords a good defence. The doctrine of part performance does not here apply.

F. J. Harris.

Mozley and Dennison.

For the character of the acts of part performance required to take a verbal contract out of the Statute of Frauds, see the cases collected in the notes to *Lester v. Foxcroft*, *ubi supra*, and *Maddison v. Alderson*, L. R. 8 App. Cas. 467.

As to whether, since the Judicature Acts, the equitable doctrine of part performance is not applicable in actions for damages for breach of contracts, as well as in actions for their specific performance, *quære*? see *The Mayor, &c., of Kidderminster v. Hardwick*, L. R. 9 Ex. 13.

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STEPHEN, J.

LA COMITÉ DES ASSUREURS MARITIMES AND
OTHERS v. THE STANDARD BANK OF SOUTH
AFRICA AND OTHERS.

1883.

June 4.

THIS was an action brought by the insurers, consignors and consignees of a cargo of coffee to recover from the defendant Bank a sum of 7,500*l.* under the following circumstances:—

One Henderson having stolen the steamer *F'erret* proceeded with it to Santos in Brazil, and there shipped a cargo of 400 tons of coffee consigned to purchasers at Genoa, on January 5th, 1881. The name of the vessel and its papers were then changed, and it proceeded to the Cape of Good Hope. At Cape Town, the cargo was sold by Henderson, through a firm of Anderson & Co., customers of the defendant Bank, for over 10,000*l.* Of this amount over 2,000*l.* was handed to Henderson, and the remaining 8,000*l.* was paid into the Cape Town branch of the defendant Bank for transmission to their London branch; ten bills of exchange, six for 1,000*l.* each, and four for 500*l.* each, being drawn in sets of three, by the Cape Town branch, on the London branch, payable at ninety days' sight to the order of Henderson, to whom the bills were handed. Of these ten bills, one for 500*l.* was afterwards negotiated by Henderson at the Mauritius (and in respect of this 500*l.* no claim was made by the plaintiffs in this action); and 4,000*l.* worth of the firsts of exchange were produced in Court by the plaintiffs. They had been seized by the sheriff of Melbourne under an execution against Henderson for the debts of certain creditors who were made parties to this

Where a person wrongfully obtained goods and sold them, and the proceeds of sale were paid into a colonial bank, for the purpose of transmission to its London branch, he receiving bills of exchange to the amount of the proceeds drawn by the colonial bank on its London branch. Held, that the owners of the goods were entitled to follow the proceeds in the hands of the bank, and to be paid the amount of the bills, as bills, as they became possessed of them.

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action, but had disclaimed. The New South Wales Statute contained a clause identical with the 1 & 2 Vict. c. 110, s. 12, giving the sheriff power to seize bills. The sheriff was made a party, as also the National Bank of Australasia (London), to whom the sheriff sent home the bills for presentation to the Standard Bank. The remaining bills, three for 1,000*l.* each, and one for 500*l.*, were not forthcoming, nor was their whereabouts at all known. The plaintiffs, the insurers, had paid, as upon a total loss of the cargo, and this action was brought to recover the sum of 7,500*l.*, which had been transmitted to England, and was in the hands of the London branch of the defendant Bank.

The statement of claim asked for a declaration that the 7,500*l.* was the property of the plaintiffs, and a declaration, if necessary, that the bills representing the same were the property of the plaintiffs. The Standard Bank alleged that they were ready to honour the bills provided the Court should be of opinion that they were in due order for payment.

Davey, Q.C., Dr. Phillimore and Stubbs for the plaintiffs, referred to *Knatchbull v. Hallett*, 13 Ch. D, 696; *Pennell v. Deffell*, 4 D. M. G. 372; *Lewin on Trusts*, p. 732, 6th ed.

Lumley Smith, Q.C., Langley, and H. D. Greene, for the Standard Bank contended that by suing for the proceeds of sale, instead of suing Henderson for damages for the tort of conversion, the plaintiffs had made Henderson their agent: and further that they could not adopt his acts in part and repudiate them in part (*Brewer v. Sparrow*, 7 B. & C. 310). Therefore that Henderson had lawfully converted the monies into bills, and that the plaintiffs could only claim the bills as such. That as to the bills, for 3,500*l.*, which were outstanding, it was in Henderson's power to give to an indorsee for value without notice a better title than that of the plaintiffs (*Dawson v. Prince*, 2 De G. & J. 41). None of the bills were indorsed (*Watkins v. Maule*, 2 Jac. & Walker, 237; *Edge v. Romford*, 81 Beavan, 247).

Bompas, Q.C., and Solomon for the Sheriff and the Bank of Australasia.

HIS LORDSHIP held that the plaintiffs were entitled to follow the bills as bills in the hands of the defendant Bank,

as representing the proceeds of sale of the cargo, and ordered the Bank to pay to the plaintiffs 4000*l.* with interest thereon at bank rate, from the date of presentation of the bills; the bills produced in Court to be declared cancelled and satisfied, as against all persons whomsoever.

As to the bills not forthcoming, the Court made a declaration that they were the property of the plaintiffs, or some of them, and adjourned the further consideration of the case to enable the plaintiff to obtain possession of them.

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Tamplin, Taylor & Joseph.

STEPHEN, J., and a C. J.

JOHNSON v. HOOK.

1883.
March 19 & 20.

THIS was an action for damages for the wrongful conversion of hops. At the trial his Lordship, on the findings of the jury, reserved the case for further consideration.

The case was argued on further consideration before his Lordship on June 9th by *Kemp, Q.C.*, and *Winch* for the plaintiff, and *Murphy, Q.C.*, and *E. Pollock* for the defendant. His Lordship reserved judgment, and the facts and arguments sufficiently appear therefrom.

The measure of damages in an action for conversion of goods is not restricted to their value at the date of the conversion, even where no special damage is laid.

STEPHEN, J.—The facts of this case are as follows: Johnson in 1878 bought thirty-one pockets of hops and warehoused them with the defendant, who warehoused hops in the Borough. The warehouse rent not being paid the defendant, on the 5th July, 1882, wrote and posted a letter giving plaintiff notice that they intended to sell his hops and satisfy the rent. The plaintiff swore and the jury found that he never received that letter. The defendant on the 7th July, 1882, sold the hops to one Rawley, and on the 22nd July wrote the plaintiff a letter informing him of the sale, and sending him a cheque for the balance of the purchase-money

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over the warehouse rent. The plaintiff swore and the jury found that he never received this letter. On August 24th there was a conversation between the plaintiff and the defendants at Tunbridge Wells, in the course of which the defendant told the plaintiff that he had sold the plaintiff's hops. On the 4th of October the plaintiff made a formal demand for the hops, which were not given to him.

It was admitted that on the 5th July the hops were worth 1l. 1s. 0d. per cwt., on the 25th August 3l., on the 4th October 90s., and that the quantity of hops was 44 cwts. It further appeared that Hook sold the hops to Rawley July 7th for 21s. a cwt. Rawley sold them back to Hook on July 29th for 40s. a cwt.; Hook sold them to Large on the same day at 42s. per cwt. Large sold them to Kitchen on August 16th at 58s. Kitchen removed them from Hook's warehouse on September 20th, up to which time they remained there, being held first for Rawley, then for one day for Hook, then for Large, and finally for Kitchen.

The question was what was to be the measure of damages for the conversion of the hops. The plaintiff argued that the measure of damages was the value of the hops on the day when the hops were removed from the defendant's warehouse, but that at all events it should be their value of the 25th August when the plaintiff had notice of their conversion, and not, as the defendant contended, their price on the 7th July, which was the date of the sale to Rawley.

The question is singularly bare of authority. The cases to which my attention was called were *France v. Gaudet*, L. R. 6 Q. B. 208, and *Greening v. Wilkinson*, 1 C. & P. 625. But the first of those cases proves only that if special damage by a wrongful conversion is pleaded and proved, it may be recovered, and in this case no special damage is either pleaded or proved. The case of *Greening v. Wilkinson*, a *Nisi Prius* decision of Lord Tenterden's, is to the effect that an earlier decision of Lord Ellenborough's, that the value of the goods converted on the day of conversion is the proper measure of damages "is hardly law," and that where the price of cotton had risen subsequently to demand and refusal, the jury were not to be restricted to the value of the cotton at the day of demand and refusal. These decisions probably conflict with each other, and neither of them

furnishes any rule upon which my decision can be guided. The matter must, therefore, be considered on principle.

It is admitted that the sale by the defendant on the 7th of July was wrongful, and as it was not a sale in market overt it did not change the property in the goods, and the same may be said of all the subsequent sales. The property of the plaintiff in the hops continued up to the time when they were removed from the defendant's warehouse; he might have taken them thence, or he might have sued Kitchen for them. Indeed he might even now sue any person who has possession of them if they are still in existence and have not been sold in market overt. Therefore the defendant is responsible for any wrongful act done by him with respect to these hops at any time.

The first wrongful act done by him was clearly the sale to Rawley, which was obviously "an exercise of dominion over them, which was inconsistent with the title of the owner." The act in itself does no harm to the plaintiff, as it does not affect his title or put the hops out of his power. The repurchase from Rawley and the resale to Large were also wrongful, and so I think was the holding of the hops, which he ought to have known were still the plaintiff's, to the order first of Large and then of Kitchen, and I think the same must be said of his delivering them to Kitchen and permitting Kitchen to take them away. This leads to the conclusion that the measure of damages is the value of the hops when Kitchen was allowed to take them away on the 25th September.

I do not see how the conversation on the 25th August affects the matter. The substance of it is, that the defendant says to the plaintiff, "I have sold your hops." He does not appear to have gone on to say, "I am still holding them at the order of another man, and if you think you have a right to them come and take them." Nor do I see what difference it would have made if he had said so. Suppose the plaintiff had said, "you had no right to sell them, they are mine, and I warn you not to deliver them to any other person," what difference would that have made? Notice to a true owner of a wrongful sale and a wrongful possession appears to me to give no right to a wrong-doer. The defendant put himself in the wrong by selling the hops first to Rawley and then to Large, and I think that he could not set himself right merely

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by telling the plaintiff that he had done wrong. If he had wished to do so, he should have ascertained whether the plaintiff still claimed the hops and have then taken proper steps to see whether he was entitled to them or not, and what were his own liabilities to Large and Kitchen.

There will be judgment for the plaintiff for the amount ascertained by calculating the value of the hops on September 20th.

Champion, Robinson, and Poole.

L. A. Rice.

The conflict between Lord Ellenborough in *Mercer v. Jones*, 3 Campbell, 477, and Lord Tenterden in *Greening v. Wilkinson*, 1 Car. & P. 625, exists likewise in America; Story, J., in *Watt v. Potter*, 2 Mass. 77, and Mr. Sedgwick (Sedgwick on Damages, pp. 505, 559, 4th Ed.), agreeing with Lord Ellenborough's view; and Kent, J., in *Cortelyou v. Lansing*, 2 Caine's Cas. 200), agreeing with Lord Tenterden.

In favour of restricting the damages to the value of the goods at the date of the conversion, it may be said, that the owner may at once buy other goods at a price equivalent to the value of the goods converted; that upon the act of conversion, he can at once sue for, and, but for the law's delay, at once recover damages for the conversion, in which case he would necessarily lose the benefit of any subsequent rise in the value of the goods; that the measure of damages in the analogous case of a breach of contract to deliver goods, is the difference between the contract price and the market price, at the date of breach; and that the provisions of 3 & 4 Wm. IV. c. 42, § 22, afford an implied statutory recognition of this view.

On the other hand, to restrict the damages to the value of the goods on the day of conversion, is to allow one man to appropriate to himself another man's goods at the market price of the day; and to invite him so to do, on account of the probable profit, where there is a rising market.

1883.

June 7.

A garnishee can set off against a judgment creditor costs incurred by him, but not paid at the time the issue is directed, against which the judgment debtor is bound to indemnify the garnishee.

DAT, J.

RYMILL v. THE WANDSWORTH DISTRICT BOARD.

THIS was a garnishee issue, directed to ascertain whether any and what sum was due from the defendant Board to one Nobbs on the 2nd December, 1882.

That a balance of 55*l.* 7*s.* was due to Nobbs from the Board on that day was admitted, as also the fact that that sum had been paid to Rymill in January, 1883 ; but the real question which (as his Lordship said) the parties came to try was, whether the Board could, under the following circumstances, set off against the amount then due from them to Nobbs (which was considerable), two sums of 168*l.* 11*s.* 4*d.* and 88*l.* 10*s.* 8*d.*

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On March 23rd, 1881, Nobbs entered into an agreement with the Board for the execution of certain works: Rymill was a party to this agreement as one of Nobbs' sureties. By Clause 1 of this agreement, it was agreed that "fines, penalties, or other sums of money, which the contractors may become liable to pay under the contract, or the said specification, may be deducted from any sums then due, or thereafter to become due from the Board to the contractors, or may be recovered from the contractors or their sureties."

Clause 2. "The contractors shall be responsible for all accidents and damages of any kind which may occur during the time of, or consequent upon the performance of any work under the contract, and shall indemnify the Board and their officers and servants against the same; and the Board may, if they think fit, compromise any claim which may be made upon them or their officers or servants, or any action which may be brought against them, or any of them, in respect thereof, and the contractors shall forthwith repay such amount, or the same may be deducted in manner aforesaid."

On June 6th, 1882, one White commenced an action against the Board for damages for injuries sustained by him in an accident, due to a defect in the road on which Nobbs had done the work: at Nobbs' request, the Board defended this action; and on July 28th, 1882, White obtained judgment therein against the Board for 70*l.*, and 98*l.* 11*s.* 4*d.* costs; and the said sums were forthwith paid. The costs due from the Board to their own solicitors for defending the action amounted to 88*l.* 10*s.* 8*d.*; but these were not paid by the Board, nor had the bill in respect of these even been rendered until after the date of the order directing the issue to be tried.

Edward Pollock & Dickens, for Rymill, contended that

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the 168*l.* 11*s.* 4*d.* and 88*l.* 10*s.* 8*d.* did not fall within either Clauses 1 or 2 of the contract, and could not therefore be deducted from the debt due from the Board to Nobbs: as to the 88*l.* 10*s.* 8*d.*, they further contended that, till payment of the same, which was not made at the date of the issue, was directed, the Board could not treat that amount as a debt due to them from Nobbs.

[DAY, J.—It was a mere question of ascertaining the amount of the indemnity: *Id certum est quod certum riddi potest.*]

They quoted *Jones v. Thompson*, 1 Ell. & Bl. 63; 27 L. J. Q. B. 234.

Philbrick, Q.C., and *R. O. B. Lane*, for the Board.

DAY, J.—The contract is badly drawn, and calculated to give rise to doubt and difficulty; but in my opinion the money sought to be deducted by the Board falls within the very words of the first clause: I do not think the words “or other sums of money” are *ejusdem generis* with fines and penalties, but comprise all sums of money which might become due to the contractors in respect of the contract, nor do I think that Clause 2 limits the rights of the Board to cases where the Board elects to compromise the action.

It is meant to meet the difficulty of letting the case go to trial when the contractor won't interfere in the action, and to prevent him from afterwards objecting to the compromise as a thing which ought not to have, of course, been adopted. I hold, therefore, that the Board can deduct both the 168*l.* 11*s.* 4*d.* and the 88*l.* 10*s.* 8*d.*

The case of the latter amount is, indeed, an *à fortiori* one; as it represents costs incurred by the Board at the request of Nobbs. These had been incurred before the 2nd of December, and they could, therefore, on that date deduct it from monies due by them to Nobbs.

Corsellis, Son, & Mossop.

Keene & Marsland.

Although a claim, or verdict for unliquidated damages, or a mere cause of action does not constitute an attachable debt, (*Jones v. Thompson*, 27 L. J. Ex. 217; Q. B. 234; E. B. & E. 63); *Johnson v. Diamond*,

24 L. J. Ex. 217; 11 Ex. 73; yet the test of what constitutes an attachable debt is not applicable for the purposes of ascertaining what claims by way of defence, set-off, or counter-claim a garnishee may avail himself of against a judgment creditor; on the contrary, as the judgment creditor stands, for the purposes of the garnishee issue, in the shoes of the judgment debtor, the garnishee is entitled to assert against him all claims which he could have asserted against the judgment debtor, either as plaintiff or defendant in an action (*Nathan v. Giles*, 5 Taunton, 558; *Tapp v. Jones*, L. R. 10 Q. B. 591; *Kaupt Kaupt*, coram, Cleasby, B., June 28th, 1878), but no others, not even claims by the garnishee against the judgment creditor personally (*Sampson v. Seaton Railway Co.*, L. R. 10 Q. B. 28).

That a liability incurred in respect of costs for which another party has agreed to be responsible, may give a good cause of action against such other party, although the costs have not been paid, see *Sparks v. Heslop*, 1 Ell. & Ell. 563; 28 L. J. Q. B. 197. See, too, generally, *Randall v. Roper*, Ell. Bl. & Ell. 84; 27 L. J. Q. B. 266.

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GROVE, J., and a S. J.

SNELL v. HEIGHTON.

1883.
Junc.

IN this action the plaintiff sought to recover the value of certain bricks which had been taken in execution upon a judgment obtained by the defendant in an action of *Heighton v. Kellond*.

The plaintiff alleged that 60,000 bricks out of 62,000 seized in execution had been sold to him by Kellond some time prior to the seizure. A receipt for purchase money of the bricks was given to him in the following form:—

“Received of Mr. Snell the sum of 80*l.* for 60,000 stocks and grizzles now lying on a piece of ground on the Willesden Park Estate, corner of Willesden Lane, Park Avenue.

J. & H. KELLOND.

80/12/2.

Stamp.
£80 : 0 : 0
December 30th.

Where a receipt was given for £80 as the purchase money of 60,000 bricks which remained in the possession of the seller. Held, a document needing registration under the Bills of Sale Act, 1878. Where, after a sale of 60,000 bricks, part of a bulk of 117,000, the seller had applied all but 62,000 for other purposes, and was still using them when seized in execution. Held, that there was no appropriation of any part of the 60,000 to the sale.

This was the only record of the transaction, except two cheques given by the plaintiff in payment for the bricks. The

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cheques and receipts were signed and given at the plaintiff's shop at the same time. The receipt had not been registered as a bill of sale.

The 60,000 bricks were bought by the plaintiff from a bulk of 117,000 bricks, which had been placed on the ground by Kellond in different stacks. The 60,000 in question had not been set aside or earmarked in any way, and bricks were being used daily by Kellond's workmen, or other purchasers from him, until the seizure, at which time there were about 62,000 bricks left on the ground.

At the close of the plaintiff's case, *Dickens* (with him *Murphy, Q.C.*), for the defendant, submitted that there was no case to go to the jury, as (1) there had been no specific appropriation of the 60,000 bricks, and consequently no property in them had passed to the plaintiff; (2) that even if it had, this receipt was a bill of sale within the terms of Sect. 4 of the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31*): and not being registered, was void as against the defendant. He cited *Ex parte Cooper*, L. R. 10 Ch. D. 313; *Woodgate v. Godfrey*, L. R. 5 Ex. Div. 24; *Marsden v. Meadows*, L. R. 7 Q. B. D. 80.

Lumley Smith, Q.C. (with him *Tyser*), for the plaintiff, contended that the facts showed a sufficient appropriation of the bricks to pass the property, and that this receipt was not a bill of sale within the meaning of the Act. There was here no inventory and no witness as in *Ex parte Cooper* (*ubi supra*), nor did the plaintiff's title to the bricks depend upon the receipt.

* Section 4. In this Act the following words and expressions shall have the meanings in this section assigned to them respectively, unless there be something in the subject or contract repugnant to such construction; (that is to say).

The expression "bill of sale" shall include bills of sale, assignments, transfers, declarations of trust without transfer, inventories of goods with receipt thereto attached, or receipt for purchase-

moneys of goods and other assurances of personal chattels, and also powers of attorney, authorities or licences to take possession of personal chattels as security for any debt, and also any agreement, whether intended or not to be followed by the execution of any other instrument by which a right in equity to any personal chattels, or to any charge or security thereon shall be conferred, but shall not include the following documents, etc., etc.

GROVE, J.—I think the plaintiff has failed upon both points to make out his case. The facts proved show no appropriation, and consequently the property in the bricks did not pass to the plaintiff. As to the second point, the words of the Act are clear, and this document falls within them. The goods remained in the possession of the seller, the receipt being handed over to the purchaser. There must be judgment for the defendant.

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v.
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Ravenscroft, Hill, & Woodward. Thompson & Wood.

DAY, J., and a C. J.

MINSHULL v. BRINSMEAD.

1883.

June.

THIS was an action by the trustee of a bankrupt, Jones, to recover 90*l.* for advertisements inserted in newspapers of the bankrupt.

In October, 1880, the defendant wrote to Jones a letter in the following terms:—"Please insert our advertisements, &c., &c., to be inserted twelve times in both your Journals for 90*l.* in part payment of goods to be purchased to the amount of 360*l.* at trade price;" to which Jones answered, "We beg to acknowledge the receipt of your order for advertising, &c., &c., for twelve months for 90*l.*, we to take goods to the amount of 360*l.*, &c., &c."

Advertisements had been inserted to the value of 90*l.*, but no goods supplied by the defendant before Jones' bankruptcy in May, 1882. In July, 1882, the present plaintiff applied to the defendant for the payment of 90*l.* in cash, which was refused. In October, 1882, he applied for goods to the value of 90*l.*, but these also were refused by the defendant. It was admitted that neither Jones nor the plaintiff was ever willing to pay for 270*l.* worth of goods.

Where an agreement specified that advertisements should be inserted to the value of £90 in part payment of goods to be purchased to the amount of £360: held, that the plaintiff was not entitled to recover in respect of the £90 worth of advertisements inserted without taking the £360 worth of goods.

Tarring for the plaintiff.

McCall for the defendant.

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DAY, J.—On the true construction of this contract the plaintiff is not entitled to 90*l.* in cash at all, but only in goods, and even then, only if he takes 360*l.* worth of goods. He was entitled to have 360*l.* worth of goods in return for 270*l.* in cash and the insertion of the advertisements. The plaintiff contends that he is entitled to either 90*l.* in cash or goods and without taking the other 270*l.* worth, but I hold that the defendant was not bound to give the plaintiff less than 360*l.* worth of goods, for which the plaintiff must have inserted the advertisements and come with 270*l.* in cash in his hands. There must be judgment for the defendant.

Crook & Carhill.

Cooke, Collis & Sayer.

MATHEW, J., and a C. J.

ALCOCK v. LEEUW & CO.

1883.

June 18.

Under a charter-party providing that the ship shall load empty petroleum barrels, as many as required by the master, say about 5,000; the word "about" entitles the master to require at his option the shipment of 10 per cent. more or less than the amount specified.

THIS was an action by shipowner against charterer for damages for breach of charter-party or in the alternative for demurrage. By a charter-party dated July 12th, 1881, it was (*inter alia*) agreed that the ship *Rhine* should load at London Docks empty petroleum barrels, as many as required by the master (say, about 5,000). The vessel to be at liberty to load about 500 tons chalk on owner's account, and thence proceed to Philadelphia. The barrels to be delivered alongside the vessel, and taken from alongside as fast as the master can receive and deliver them respectively. Twenty-four hours' notice to be given before barrels are required by the captain, and the said freighters are to have the option of keeping the said ship ten days on demurrage over and above the said lay days at 4*d.* per register ton per day.

The defendants having only loaded 5,047 barrels, were applied to by the master to ship more barrels. This the defendants refused to do, stating that they had already com-

plied with the terms of the charter-party, and the main question in the cause was as to whether they had done so.*

As to this, evidence was adduced on the part of the plaintiff to show that in charter-parties of this description the word "about" meant that the shipowner was entitled at his option to a cargo exceeding, or less than, the amount specified in the charter-party by 10 per cent.

Gainsford, Bruce & Pike for plaintiffs.
Finlay, Q.C., & Pollard for defendants.

MATHEW, J.—(To the jury):—"Was this charter performed?" It is said on behalf of the shipowners that the word "about" in this charter-party means from 4,500 to 5,500, and that he was entitled to require from the defendants barrels up to 5,500. The defendants contend that in shipping 5,047 they have complied with the terms of the charter. My impression is that the plaintiffs' view is the right one, but I leave the question to you.

The jury found a verdict for the plaintiffs.

Plews, Irvine & Hodges. Cattarns, Jehu, & Hughes.

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ALCOCK
v.
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1883.

June 19.

CAVE, J.

TAPLING & CO. v. WESTON.

THIS was an action for an alleged wrongful seizure and conversion of the plaintiffs' goods. The plaintiffs were carpet manufacturers in London, and entered into an agreement with one Gibbons, according to which he was to act as their

* The other questions in the case were, as to whether proper notice had been given by the captain as to the barrels he required

under the charter-party, and as to the date from which the ship had been detained.

Where an agent under an agreement with a firm of carpet manufacturers, took premises and put his principals' name outside as well as his own, and was entitled to carry on other agency business, but was in fact agent for only one other firm: held, that the agent was not carrying on a "public trade," so as to exempt his principal's goods on his premises from distress.

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agent at Bristol for the sale of their carpets in that neighbourhood, receiving (1), a commission of 5 per cent. upon all orders obtained by him, and executed by the plaintiffs; (2), a salary of 60*l.* per annum; (3), 50*l.* per annum towards his office expenses: Gibbons to be responsible on all bad debts made, up to 20 per cent. thereof. Gibbons became lessee to the defendant of certain business premises at 28, Victoria Street, Bristol. The words "T. Taping & Co., and at Gresham Street, London," were painted in large letters in several places outside the premises, and the words, "T. Taping & Co., represented by R. E. Gibbons," were upon a permanent plate upon the door: also the words "R. E. Gibbons & Co." upon a moveable plate on the door, underneath the permanent plate. Gibbons was not bound to act solely as the plaintiffs' agent; he was, in fact, also the agent in the West of England of a firm of Drysdale & Co., shirt manufacturers in London, and was engaged in trying to obtain other agency business; he also carried on business as a general shipping agent, and had business cards of his own headed in his own name.

The course of business between the plaintiffs and Gibbons was for the plaintiffs to forward their carpets to Bristol directed to "T. Taping & Co., 28, Victoria Street, Bristol," and the invoices given to purchasers thereof were made out in the plaintiffs' names, as vendors, but the receipts for the same were given by Gibbons in his own name. Gibbons' rent being in arrear, the defendant seized the plaintiffs' goods on the demised premises under a distress for rent.

Murphy, Q.C. (with him *C. E. Jones*), for the plaintiffs, contended that the goods seized were privileged from distress, and that, though, no doubt, the plaintiffs' business was the important thing for Gibbons, yet he was entitled to carry on, and was carrying on, a general agency business. He cited *Gilman v. Elton*, 3 B. & B. 75.

Charles, Q.C. and *Short* for the defendant.

The goods were not privileged; Gibbons was not carrying on a public or recognised trade. (CAVE J.—Does not a public trade mean the carrying on of a trade publicly, and the privilege extend to any trade in which the trader invites the public to trade?) Here there was no real holding out to the public.

They cited *Gisborne v. Hurst*, 1 Salk. 250; *Muspratt v. Gregory*, 3 M. & W. 677; *Findon v. McLaren*, 6 Q. B. 891; *Lyons v. Elliott*, L. R. 1 Q. B. D. 210; and 1 Smith's L. C., pp. 458—460 (8th edition). 1883.
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CAVE, J.—I must give judgment for the defendant. I think Gibbons was not carrying on any public trade—*i.e.*, a trade in which he invited the public to entrust him with their goods. Further, the plaintiffs entrusted their goods to Gibbons as their agent and representative under the agreement, and not as a general agent.

Phelps, Sedgwick & Riddle.

Spencer Whitehead.

As to what constitutes a "public trade," Parke, B., in *Muspratt v. Gregory*, 1 M. & W. at p. 653, says: "The word 'public' is to be understood to refer to every trade or employ carried on *generally* for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals; although it be not 'public' in the sense that all the king's subjects have a right to insist on the trader accepting their goods, and that an indictment or action would lie if he did not." See, too, *Gibson v. Ireson*, 3 Q. B. 39, where Patterson, J., says, that he does not know what is meant by a "public trade." That the trade of a tailor is not public in one sense; he is not obliged, as a carrier is, to receive whatever is sent to him. Williams, J., in the same case, says that to make the publicity depend upon the quantity of the trade would introduce a very uncertain criterion.

MATHEW, J.

WHITE v. HAYMEN AND OTHERS.

1883
June 25.

THIS was an action brought against the Directors of the Patent Fibre and Extract Co. to recover 100*l.*, the amount An "Abridged prospectus" not containing the date of, nor the names of the parties to, a contract for the sale of a patent to be worked by the Company, to trustees on behalf of the Company; held to be fraudulent within s. 38 of the Companies Act, 1867, although it stated where full prospectuses could be obtained.

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v.
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paid by the plaintiff on the allotment of shares therein to him, on the ground of non-compliance with the provisions of s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 181).*

The plaintiff, after having seen in the *Daily Telegraph*, of October 31st, 1881, an "Abridged Prospectus" of the company, applied for the shares in question. The "Abridged Prospectus" contained (*inter alia*) the following statements:—

"PROSPECTUS ISSUED MONDAY, 31st OCT., 1881.

"The price to be paid for the patent for Great Britain and Ireland, and the Channel Islands and the Isle of Man, together with the right to take out all such foreign patents as the company may think fit, is 30,300*l.*, of which 300*l.* are to be paid in cash and the remaining 30,000*l.* in fully paid up shares of the company.

"Full prospectuses and forms of application can be obtained at the offices of the company, of the brokers, and of the solicitor of the company."

The full prospectus contained the following statements not contained in the "Abridged Prospectus."

"(1.) The Directors notify that the Chairman has an interest in the patents.

"(2.) The only contract entered into is an agreement bearing date the 1st September, 1881, made between William Guest, Charles Court, Henry Haymen, and Francis Rockcliffe of the first part, the said Henry Haymen of the second part, the said Francis Rockcliffe of the third part, and James Glinnan, as trustee for and on behalf of the company, of the fourth part. That document, together with the Memorandum and Articles of Association, the British patent, dated the 18th June, 1881, under the Great Seal, the Reports of Mr. W. M.

* "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint-stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors

of the company, or otherwise; and any prospectus not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company, knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

Riddell and Mr. J. Stoneman, can be seen at the offices of the solicitors of the company."

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WHITE
v.
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The defendant Haymen was chairman of the company, and had been one of its promoters, as well as a vendor of the patent to the company under the Agreement of the 1st September.

The plaintiff admitted upon cross-examination that he had no doubt upon reading the abridged prospectus that there was some contract in existence.

Finlay, Q.C., and Moulton for plaintiff.

Jelf, Q.C., and E. S. Ford for defendants.

MATHEW, J., after reading sect. 38 of the Companies Act, proceeded as follows:—In this case the plaintiff was induced to apply for shares in the company on the faith of what is called "an abridged prospectus." This contains various usual statements as to capital, directors, &c., and also states where full prospectuses can be obtained. I have seen the full prospectus, and on comparing it with the abridged one, I think the defendants have really decided the question against themselves. The case is within the mischief intended to be met by sect. 38. The abridged prospectus is clearly a prospectus within the meaning of the Act, which applies to every prospectus. The defendants further rely upon the concluding words of the section, but I do not think they assist them. If the doctrine of constructive notice were applicable, the object of the section would be defeated; for that object is to avoid the necessity of being put upon that inquiry which is involved in the doctrine of constructive notice. There must be judgment for the plaintiff.

Linklater, Hackwood, Addison & Browne.

McDiarmid & Feather.

MATHEW, J.

POCOCK v. GILHAM.

1883.

June 27.

The erection of wooden boardings for the purposes of advertisement fastened to the demised premises: held to be a breach of a covenant not "to erect or make any other building or erection on any part of the demised premises."

IN this action the plaintiff claimed an injunction to restrain the defendant from erecting or allowing to remain erected upon any part of certain demised premises any hoarding, advertising board, or other erection. By lease, dated the 31st May, 1881, the plaintiff demised to the defendant the said premises, which consisted of a piece of land with a dwelling-house thereon, for 21 years. The lease contained (*inter alia*) a covenant that the lessee would not without licence in writing alter or vary the said messuage or dwelling-house, nor erect or make any other building or erection upon any part of the demised premises."

The defendant had erected wooden hoardings for the purposes of advertisement against the side of the dwelling-house, and on the top of a parapet wall, by nails and holdfasts driven into the walls of the building over a superficial area of about 570 feet.

E. S. Ford for the plaintiff.

Boome for the defendant.

MATHEW, J.—I think there has been a breach of the covenant. The defendant has affixed hoardings for advertisements, permanent enough for that purpose, and on the parapet wall an extra story for that purpose. It seems to me the plaintiff is entitled to the relief he asks.

D. Birt.

Fowler & Co.

DAY, J., and a C. J.

SMITH v. GORDON.

1883.
June 29.

IN this action the plaintiffs, executors, sued (*inter alia*) upon a promissory note given by the defendant to their testator. It was payable a month after demand. The defence set up was, that before any demand made, the debt had been forgiven by the testator.

Where a promissory note was payable a month after demand, forgiveness of the amount of the note is no defence unless the forgiveness be *before* the note has become payable.

Man for the plaintiffs.*L. Hart* for the defendant.

DAY, J., after observing that these defences must be watched with jealousy; otherwise a testator's estate would be at the mercy of persons who come forward and set up a discharge of their debts, proceeded: "Was this debt due at the time of the alleged forgiveness? If so, the forgiveness is inoperative; a deed, or a new bargain on consideration would be necessary. For the promissory note to become due, a demand must be made. Was it made? If the debt was due at the time of the forgiveness, and a writ could have been issued, you must find a verdict for the plaintiffs."

*The jury found a verdict for the plaintiffs.**F. Clift.**W. Vant.*

It was decided in *Foster v. Dawber*, 6 Exch. 851, that the general rule that a simple contract debt can only be voluntarily discharged *before* breach, had no application to the case of bills of exchange or promissory notes. See also the judgment of Willes, J., in *Cook v. Lister*, 13 C. B. N. S. at p. 593. The soundness of this doctrine has, however, been doubted from time to time, and the decision in a recent case of *McManus v. Bark*, L. R. 5 Ex. p. 65, seems difficult to reconcile with *Foster v. Dawber*; unless, indeed, the distinction be, that although there may be a discharge *in toto* from liability upon a bill or note by parol and after breach, yet where a new agreement to pay the amount due on the bill or note by quarterly instalments has been substituted, this requires consideration to support it.

STEPHEN, J.

McCAUL v. STRAUSS & CO.

1883.

June 15 & 16.

Where a broker employed by the seller alone, effects a contract by means of a note sent to and accepted by the purchaser, a variation between this note and a note sent by the broker to the seller is immaterial. Letters not containing any reference to the quality or the time for payment of goods sold as agreed upon do not constitute a sufficient memorandum of the contract to satisfy the Statute of Frauds.

THIS was an action to recover the price of tin sold. At the hearing, the jury were discharged by consent, and the case tried by his Lordship alone. His Lordship reserved judgment.

Finlay, Q.C., and *H. D. Greene*, for the plaintiff.

Cohen, Q.C., and *Barnes*, for the defendants.

The facts and arguments sufficiently appear from the judgment.

STEPHEN, J.—This case was tried before me, the jury which had been sworn having been discharged by consent, on Friday and Saturday, June 15th and 16th.

The action was to recover the price of tin alleged to have been sold by the plaintiffs to the defendants. The defendants denied that they had contracted with the plaintiffs, and pleaded the 17th section of the Statute of Frauds.

The facts were as follows:—Mr. Sanford said that he had been a metal broker for more than ten years, though he also said that he dealt on his own account as well, that he habitually sold for the plaintiffs, that the plaintiffs instructed him to sell certain tin to arrive by the *Cardigan Castle*; and that on the 13th January, he wrote a note to the defendants, which the defendants accepted, and on the 7th February two other notes which also the defendants accepted; the material parts of these were as follows:—

In the corner were the words printed, “Percival Sanford & Co., Metal Brokers.” Then followed in writing, in the January note, and in print filled in, in the February notes;—“We have this day sold to Messrs. A. Strauss & Co. about ten (say ten) tons Australian tin, &c.” Mr. Strauss swore that he believed himself to be dealing with Sanford only, and that he knew nothing of any principal for whom Sanford might be acting; and both Strauss and Sanford swore that some years before, Sanford had been in the habit of putting “for our principals” on his sale notes, and that those words had been omitted in consequence of representations from

Strauss, who said, "I dealt only with him, Sanford." At the time when Sanford sent these notes to Strauss, he also sent to McCaul similar notes, which in the main were copies of the notes sent to Strauss, but differed from them in various particulars. In the January note sent to Strauss, the tin sold was described "as about ten (say ten) tons Australian tin of good merchantable quality to arrive by the *Cardigan Castle* sailed or about sailing." It also contained the words, "dock weights." In the note sent to McCaul, the description was "about ten tons square-bottomed Straits ^{and} _{or} Australian tin of good merchantable quality," to arrive in the *Cardigan Castle*, and the note said "dock or wharf weights."

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 McCaul
 v.
 Strauss & Co.

In each of the February notes there was a difference in price. The notes sent to McCaul, specified as the price 115*l.* per ton. In the notes sent to Strauss, the price specified was in each case 114*l.* 15*s.* per ton.

In the statement of claim the plaintiffs alleged (para. 2) that Sanford & Co. were employed by the plaintiffs and defendants as their duly authorised brokers and agents for the sale or purchase of metals; but they sued upon the notes sent by the brokers to Strauss.

On the 26th April Sanford suspended payment, and made a composition with his creditors, which was paid in the course of the month of May.

On the 26th April an account was sent by Strauss to Sanford, in which Sanford was credited with the amount due to him upon the three sales of tin, and debited with other matters, the result being that a balance of 233*l.* 15*s.* remained due from Sanford to Strauss. Strauss afterwards received the composition upon this amount. Sanford swore that at a time which he could not fix with precision, but which he believed to be before the day on which he received the account just mentioned, he told Strauss that the three contracts were made on behalf of McCaul. Strauss swore positively that he never heard that McCaul was principal in the contracts till the 29th April. In the view which I take of the case the matter is not of importance either way, but in case it should be considered important, I find that it was not proved that Strauss had any notice that any one, except Sanford, was interested, before he received the letter now to be mentioned.

1883. On the 29th April McCaul wrote the following letter to
 McCaul Strauss:—
 v.
 Strauss & Co.

“ Sir,

“ We beg to inform you that the several contracts entered into by Messrs. P. Sanford & Co., with you for the sale to you of the under-mentioned goods were entered into by them for us as our brokers and on our behalf, and we shall require you to pay us the purchase-money of those goods, and shall hold you responsible for the performance of the said contracts, and to pay us the purchase-money and for all damages and expenses by reason of your non-performance thereof.

“ 18th January, 10 tons tin per *Cardigan Castle*, at 112*l.* 15*s.*

“ 7th February, 10 tons tin per *Lanome*, at 114*l.* 15*s.*

“ 7th February,, 9 tons tin per *Cardigan Castle*, at 114*l.* 15*s.*

“ We believe that you have been aware of the above-mentioned facts for some time, but we now give you formal notice thereof.

“ Yours, &c.,

“ GILBERT J. McCaul & Co.”

The defendants on the same day wrote an answer to the letter as follows:—

“ 29 April, 1883.

“ DEAR SIRs,

“ In reply to your favour of this date we regret we cannot recognize you as principals for the contracts you mention.

“ We dealt only with Messrs. P. Sanford & Co., and their contracts do not intimate that they were operating for principals.

“ We remain, Dear Sirs,

“ Yours truly,

“ A. STRAUSS & Co.”

I have stated the facts minutely because different questions arise at each step of the case.

It was argued for the defendants first that the plaintiff had

not proved the averment in his statement of claim that Sanford was employed as broker for both parties; next, that as the notes sent by Sanford to the plaintiff differed from those sent to the defendant, the parties were not at one, and, therefore, there was no contract between them when the notes were sent, and, lastly, that as the parties were never at one, the principal, McCaul, could not on the 29th April ratify a contract which had never existed.

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This argument appears to me to be unsound. It is, I think, true that the plaintiffs did not prove that Sanford acted as brokers for both parties. It was proved that he acted as broker for the plaintiffs only, and that the defendants dealt with him as a principal. It follows that the notes sent by him to the parties did not constitute the contract, that the contract was formed by the notes which Sanford sent to Strauss, and that the notes which Sanford sent to McCaul amounted to nothing more than a report, to some extent incorrect, of the contract which Sanford as McCaul's agent had made with Strauss. What effect the inaccuracy of the notes sent to McCaul might have, I need not enquire, but whatever it might have been, I do not see how it could affect in any way the contract made with Strauss.

It follows that the contract is one made by an undisclosed principal, McCaul, with Strauss, through Sanford, who was in reality an agent, though he did not contract as such, and that the doctrine of ratification has nothing to do with the matter. The letter of April 29th was no ratification of a contract made without authority. It was simply a claim by a principal, undisclosed at the time of the contract, to be recognized in his character of principal.

It was not suggested that Sanford had acted beyond his authority in making the contract stated in his note to Strauss.

Several cases, *Wilson v. Tumman*, 6 M. & G. 242; *Bird v. Brown*, 4 Ex. 798; *Watson v. Swan*, 11 C. B. N. S. 756, and *Kilner v. Baxter*, L. R. 2 C. P. 174, were quoted to show the effect of a subsequent ratification on a contract made without previous authority; but it seems to me unnecessary to consider them, because in this case there was previous authority.

The second objection taken by the defendant was, that there was no sufficient note or memorandum in writing of the bargain made and signed by the party to be charged.

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The plaintiff argued that the defendant's letter of April 29th was such a note or memorandum. The two letters taken together, he contended, amounted to an admission on the part of the defendants that he had made the contracts referred to in the plaintiff's letter, though he had not made them with the plaintiff, but with Sanford.

Proof, it was argued, that McCaul was the undisclosed principal of Sanford made the letter a sufficient memorandum in writing of the bargain, to satisfy the Statute of Frauds, and he referred to *Bailey v. Sweeting*, 9 C. B. N. S. 843, and *Wilkinson v. Evans*, L. R. 1 C. P. 407, to show that a memorandum of a contract may be sufficient to satisfy the statute, though it repudiates the defendant's liability.

The defendant argued that the bargain did not sufficiently appear from the two letters, as the two letters read together showed only the quantity and price of the tin, and the ships by which it was to arrive; but were silent as to many other terms embodied in the notes, sent by Sanford to McCaul, particularly the quality of the tin and the time allowed for payment.

I think the cases referred to by the plaintiff show that the fact that the defendant repudiated his liability does not in itself prevent the letters of the 29th April from being a sufficient memorandum of the bargain to satisfy the statute.

I also think the plaintiff's and the defendant's letters must be read together, and that they do bear the meaning assigned to them by the plaintiff; but I also think that the two letters together cannot be regarded as a memorandum of the bargain between Sanford and Strauss. There is no doubt as to what the bargain was; it is contained in the notes sent by Sanford to Strauss, and there is nothing in the letters to connect the papers sent by Sanford to Strauss with the letters written by McCaul to Strauss. For anything that appears by the letters the contract referred to might have been verbal. Hence the case falls within the well-known class of cases of which *Peirce v. Cort*, L. R. 9 Q. B. 210, is the latest, in which, in the case of sales by auction, it has been held that, if a signature by the auctioneer in his book is relied on as a memorandum to satisfy the statute, it is necessary that it should in some way refer to the conditions of sale. It is true that there are cases in which it has been held that

the "bargain" in Sect. 17 is a less extensive word than the "agreement" in Sect. 4; but I know of no case which has gone so far as to say that a memorandum which refers only to the price and quantity of goods sold, and omits essential points of the description of the goods, and terms as to the time of payment, &c., can be called a memorandum of the bargain. I think, accordingly, that in this case there is no sufficient memorandum of the bargain signed by the defendant to satisfy the Statute of Frauds.

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In the course of the argument the defendant set up a defence which is not raised on the pleadings, namely, that as he had contracted with Sanford he was entitled to set up as against Sanford's undisclosed principal the debts due from Sanford to himself, and the account stated on the 26th April between Sanford and himself. The rule of law on the subject is well known and is shortly stated in *Dresser v. Norwood*, 14 C. B. N. S. p. 589, by Willes, J., "Where a contract is made by an agent for an undisclosed principal, the principal may enforce performance of it subject to this qualification, that the person who dealt with the agent shall be put in the same position as if he had been dealing with the real principal, and consequently he is to have the same right of set-off which he would have had against the agent." If my decision on the rest of the case had been in favour of the plaintiffs, the defendant was to have been allowed to amend his pleadings so as to raise this defence, upon terms as to costs to be decided upon by me; but as I decide in his favour on the other branch of the argument, it is unnecessary to say more about it.

There must be judgment for the defendant with costs.

Carter & Bell.

Waltons, Bubb & Walton.

CAVE, J., and a C. J.

FAY v. BIGNELL.

1883.

July 1.

Where dancing is not the principal part of a public entertainment, even though it is the principal part of a particular performance in the entertainment, if that particular performance be not a principal part of the entertainment, a dancing licence is not required under 25 Geo. II. c. 36, s. 2.

THIS was an action to recover a penalty under the statute 25 Geo. II. c. 36, s. 2, from the defendant for keeping rooms for public dancing without a licence. The defendant was the proprietor of the "Trocadero," for which place he held a music licence only. The entertainment complained of, for the most part consisted of music, singing, and acrobatic and grotesque performances; it appeared, however, that one artiste, who was described upon the programme as a "change artiste and dancer," the principal feature of whose performance was to portray extreme rapidity in change of costume (the change of costume being effected behind the scenes), appeared on the stage in the national dress of different countries, and while so present, executed a national dance. Several of the other artistes accompanied their songs with slight dancing or rhythmical movements of the legs and feet. The whole entertainment occupied some four or five hours, about half an hour of which was taken up by dancing, spread over the whole performance.

Jelf, Q.C. (with him *A. Williams*), for the plaintiff, cited *Bellis v. Beale*, 2 Esp. 592; *Gregory v. Taffs*, 6 C. & P. 271; *Marks v. Benjamin*, 5 M. & W. 565; *Archer v. Willingrise*, 4 Esp. 186; *Guaglieni v. Mathews*, 34 L. J. M. C. 116; *Reg. v. Tucker*, L. R. 2 Q. B. D. 417; to show that the defendant had been guilty of a breach of the statute.

Kemp, Q.C., and *Wheeler*, for the defendant.*

CAVE, J., to the Jury.—Has the defendant kept a room for public dancing? To decide this, you must consider first, whether dancing was a part of the performance in question; secondly, if so, whether it was a principal part of the performance? If the dancing was only subsidiary, it is not within

* *Kemp*, Q.C., formally took the point that "public dancing" means only dancing by the public, though

he admitted that in a Court of first instance, the point was concluded by authority.

the mischief of the statute. It is not every movement of the legs and feet which constitutes dancing. It must be a graceful and rhythmical motion. In the case of a song, too, accompanied with such movements of the body, if the song were the principal part of the performance, you would probably think the dancing merely subsidiary. In this entertainment twenty performers take part, and suppose dancing be a principal part of one performance, still the question remains, is that performance a principal part of the entertainment? Because if the performance is merely subsidiary, and not a principal part of the entertainment, the dancing would still be subsidiary.

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v
BIGNELL.

The jury found a verdict for the defendant.

Rubinstein.

Woodbridge & Sons.

DAY, J.

WATKIN v. NEWCOMEN.

1883.

July 2.

THE plaintiff, an executor, sued in detinue and for damages, for the detention of certain goods and effects of the testator taken possession of by the defendant after his death.

The defendant counter-claimed against the plaintiff for the funeral expenses of the testator, which he had paid, and for the debts due to the defendant from the testator in the testator's lifetime.

The defendant had admitted the plaintiff's claim, and had obtained an order at Chambers in pursuance of Sect. 25 of the Common Law Procedure Act, 1860,* under which he paid

In an action by an executor for the detention of goods of his testator taken possession of, after the testator's death, the defendant may counterclaim for the funeral expenses of the testator paid by him, and also for a debt due to him from the testator before his death.

* "In any action brought upon a bond which has a condition or a defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, and in any action for detaining the goods of the plaintiff, it shall be lawful for the defendant, by leave of the Court or a Judge, and upon such terms as they or he shall think fit, to pay into Court a sum of money to answer the claim of the

plaintiff in respect of such bond in the former case, and in the latter case, to the value of the goods alleged to be detained; and such payment into Court shall be made and pleaded in like manner and according to the provisions of the Common Law Procedure Act, 1852, and the like proceedings may be had and taken thereupon as to costs and otherwise.

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into Court the sum of 20*l.*, as and being the value of the goods held by the defendant, and damages for their detention.

Bowen Rowlands, Q.C. (with him *Terrell*), for the plaintiff, argued that the defendant could not counterclaim against the plaintiff as executor in this action, either in respect of the funeral expenses or the other debts of the testator. He cited *Scholefield v. Corbett*, 11 Q. B. 779; *Cowlinslaw v. Hardy*, 25 Beav. 169; *Lambert v. Older*, 17 Beav. 542.

Holl, Q.C. (with him *Arbuthnot*), for the defendant, referred to *Hodson v. Mochi*, L. R. 8 Ch. D. 569.

DAY, J.—I am against the plaintiff on both heads: *Lambert v. Older* (*ubi supra*) is very distinguishable. That was an attempt, where an estate was insolvent, to gain priority by purchasing the testator's goods. Here I hold that the defendant is entitled to counterclaim in respect of both the funeral expenses and the other debts due to him from the testator.

C. E. Lloyd.

A. J. Boak.

As to the executor's liability for funeral expenses, see *Green v. Salmon*, 8 Ad. & Ell. 348, and *Corner v. Shaw*, 3 M. & W. 350.

MATTHEW, J.

MORGAN v. DAVEY.

1883.

July 4.

Where in a deed of grant of land there was a clause that a rent charge should be paid by the purchaser, his heirs or assigns, to the vendor, his heirs and assigns, if the purchaser, his heirs or assigns should at any time dig and work, &c., any mines, &c., on the property granted: Held, that the rentcharge was validly created, and the clause not void as violating the rule against perpetuities.

An agreement to pay a sum by way of rentcharge or royalty in respect of minerals which may be raised or obtained by, from, or out of any mine or mines, pit or pits in, upon, or under the property granted, does not entitle the person in whose favour the rent-charge or royalty is created to receive payment in respect of minerals brought up at the mouth of pits upon, but not procure^d under, the property granted.

In this case an indenture executed on the 27th of November, contained the following clause:—"Morgan Morgan, for himself, his heirs, executors, administrators, and assigns

grants, covenants, promises, and agrees to and with the said Richard Morgan, his heirs, and assigns, that if the said Morgan Morgan, his heirs or assigns, or any of them, or his, their, and any of their tenants or lessees, shall at any time or times hereafter dig and work or otherwise make and open any mine or mines, pit or pits, in upon or under the hereditaments and premises hereby granted and released, or any part thereof, with a view of raising or obtaining any coal, culm, or mineral in the nature of coal or culm, then that the said Morgan Morgan, his heirs or assigns, or his or their tenants or lessees so making, opening, or working any such mine or mines, pit or pits, shall and will within 21 days next after the 25th of March, 24th of June, 29th of September, and 25th of December in every year render unto the said Richard Morgan, his heirs or assigns, a true and just account in writing of every wey of 10 tons of coal or culm or mineral in the nature of coal or culm that shall be raised or obtained by, from, or out of any such mine or mines, pit or pits aforesaid, and shall and will within the space of one calendar month next after every such 25th of March, 24th of June, 29th of September, and 25th of December, well and truly pay, or cause to be paid, unto the said Richard Morgan, his heirs and assigns, the sum of 2s. by way of rentcharge, or royalty, or reservation for and in respect of every such wey of 10 tons of coal or culm or mineral in the nature of coal or culm, which may be so raised or obtained by, from, or out of any such mine or mines, pit or pits, as aforesaid."

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The plaintiffs represented the vendors of the property sold subject to the said rentcharge, and the defendants the purchasers.

The mines were not worked, nor the pits opened till 1849.

The questions raised were (1) whether the grant of the rentcharge was void, as violating the rule against perpetuities, (2) whether the royalty was payable on all coal brought to the surface upon the property sold, or only on such coal as was procured from under the property.

Baylis, Q.C. and *Dauney* for the plaintiffs, relied as to the first point, upon *Gilbertson v. Richards*, 4 H. & N. 277, 297; and as to the second point cited *Great Western Railway Co. v. Rouse*, 4 H.L. 650, and *Rokeby v. Eliot*, L.R. 13 Ch. D. p. 277.

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Charles, Q.C. and Farwell for the defendants cited *London and South Western Railway Co. v. Gomm*, L. R. 20 Ch. D. 562, *Lewis on Perpetuities*, p. 164.

MATHEW, J.—I am of opinion that this transaction is not within the mischief intended to be met by the rule against perpetuities, or that the arrangement contemplated is prevented by that rule; nor was any case cited to me in argument in which such a transaction has been successfully impeached. The defendants are pressed by *Gilbertson v. Richards*. That case has been much considered, and the reasons for the judgment much criticised; but no Judge has ever said that the decision was wrong. There the bargain was that any sale by the mortgagee should be subject to the rentcharge to be created. I have in vain sought to ascertain from counsel what distinction in principle exists between that case and this. I think, therefore, that the rentcharge was validly created.

As to the other point, I think the covenant means that the royalty is only payable on coal won or obtained from the property, the subject of the grant. What is reserved is a *royalty*, and that is the proper word, to describe a payment on coal won by the lessee.

Parker, Garrett and Parker.

Hacon and Turner.

CAVE, J., and a C. J.

1883.

July 5.

MYERS v. MARSH.

A mortgagee of goods can only recover against an auctioneer who has sold them by the direction of the mortgagor the actual damage he has sustained by the injury to his security.

THIS was an action by the holder of a bill of sale of certain furniture against an auctioneer for damages for conversion.

In December, 1880, the plaintiff had advanced 54*l.* secured by bill of sale on certain furniture of the grantor. Of this debt the grantor paid off 29*l.* In February, 1881, the grantor instructed the defendant to sell part of this furniture, and the defendant sold it

No evidence was offered as to the value of the whole

security, or as to the respective values of the part thereof sold, and the part not sold, by the defendant.

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MYERS
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Clay for the plaintiff.

H. Paine for the defendant.

CAVE, J. (to the jury).—The plaintiff is entitled to recover as damages, the value of his interest in the goods sold. What was it? If the defendant had sold all the goods, no doubt the plaintiff would be entitled to 25*l.*, but he only sold part, and we are left in darkness as to the proportion sold. The plaintiffs ought to show you the value of the things left, and what they were likely to realise. If with the things which were left, the plaintiff was fully secured, then he has sustained no damage. If the goods not sold were only worth 5*l.*, then the plaintiff has lost 20*l.* You must say, if you can, what the plaintiff's loss has been.

The jury returned a verdict for the defendant.

C. J. & P. Vanderpump.

Tippetts & Son.

With respect to the measure of damages for a wrongful conversion by a party having a limited interest in the goods converted, it has been decided that a mortgagor can only recover against a mortgagee the value of his equity of redemption (*Brierley v. Kendal*, 17 Q. B. 936; 21 L. J. Q. B. 161). That a purchaser who has not paid the price of goods sold, can only recover against the seller who has wrongfully resold the goods, their value, *less the contract price*, (*Chinery v. Viall*, 29 L. J. Ex. 180); but that as against a mere wrongdoer and stranger he can recover the full value of the goods, but as trustee for the seller in respect of the purchase-money not yet paid, (*Turner v. Hardcastle*, 31 L. J. C. P. 193). That a pawnor can only recover against a pawnee who has wrongfully sold the goods pledged, their value, *less the amount advanced upon them*. (*Johnson v. Stear*, 33 L. J. C. P. 130.)

It would seem to follow, *e converso*, that a mortgagee can only recover against a mortgagor, or against any person claiming through the mortgagor, or relying on the mortgagor's title, the actual damage his interest has sustained by the wrongful conversion.

LOPES, J., and a C. J.

ANGELL v. TRATT.

1883.

July 7 & 9.

Where a solicitor, whose right hand was paralysed, had his hand guided over his name to a bill of costs by a clerk who had written the name: Held, a sufficient subscription of the bill to satisfy s. 37 of the Attorneys and Solicitors Act, 1843.

In this action, brought by a solicitor to recover the amount of his bill of costs, the defence was raised that the bill had not been duly signed within the meaning of * section 37 of 6 & 7 Vict. c. 73.

The plaintiff's son, who was a clerk (not articled) in his offices, signed the bill in the presence of the solicitor, at the solicitor's house, and not in the office. After the ink had been allowed to dry, the plaintiff had his right hand guided over the signature by his son. This was done at the plaintiff's request. The plaintiff's right side was paralysed, and he could not write with his right hand, but had the use of his left hand.

Hopkins and Scrutton for the plaintiff.

Firth for the defendant.

LOPES, J., ruled that the signature was a sufficient one to satisfy the requirements of the Act.

Angell.

Duffield & Bruty.

See *Allen v. Murphy*, 9 Ir. C. L. R. 305; *Owen v. Scales*, 10 M. & W. 657; *Harrison v. Elvin*, 3 Q. B. 117.

* "From and after the passing of this Act no attorney or solicitor . . . shall commence or maintain any action or suit for the recovery of any fees, charges, or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor . . . shall have delivered to the party to be charged therewith or sent by the post to or left for him at his counting-house, office of business, dwell-

ing house, or last known place of abode, a bill of such fees, charges, and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or in the case of a partnership by any of the partners either with his own name or with the name or style of such partnership) . . . or be inclosed in or accompanied by a letter subscribed in like manner, referring to such bill, etc., etc."

CAVE, J.

STROUD *v.* AUSTIN & CO.

1883.

June 21.

THIS was an action by the purchaser of steel rails against the sellers for damages for non-delivery. The defendants admitted the breach, and paid one shilling into Court, and the question at issue was, what was the measure of damages.

On November 24th, 1881, the defendants, contractors in London, sold to the plaintiff, who carried on business in New York, a quantity of steel rails, to be manufactured in England. The material parts of the contract note were as follows:—

“Sold this day to William Lawrence Stroud, Esq., of New York, U.S.A., about 1,600 (sixteen hundred) tons of steel rails to be of maker’s usual good merchantable quality price 7*l.* per ton, c.f.i. Also the necessary quantity of suitable steel fish-plates (16,000), price 7*l.* 10*s.* per ton, c.p.i. Also the necessary quantity of bolts and nuts, price 18*l.* 2*s.* 6*d.*, c.p.i. The whole to be ready for delivery, and to be shipped in the months of December and (or) January next, in seller’s option. Shipment to be made by steamers to New York.

In an action for damages for non-delivery of goods, where the same class of goods is not obtainable in the market, at the place of delivery, the price on a subsale by a purchaser, is evidence of the *value* of the goods, and the amount by which such price on subsale exceeds the contract price may be recovered as damages, although the seller at the time of the contract had no notice of the subsale.

“JOHN H. AUSTIN & Co.

“To WILLIAM LAWRENCE STROUD, Esq.,

“104, John Street, New York, U.S.A.”

On November the 28th the plaintiff sold these rails to sub-purchasers in Canada, at a price exceeding the contract price by 864*l.* 10*s.* 11*d.*

The defendants shipped no rails under the contract, and, in addition to the loss of profit on the sub-contract, the plaintiff incurred certain charges in respect of telegrams and inspection of the rails in England, amounting to over 50*l.*, and his sub-purchasers, who were under contract to lay these rails by a fixed date, made claims upon him to the amount of over 6,000*l.*

English rails pay a duty of 28 dollars per ton on entering America, but, by the Customs’ Regulations at New York, iron of foreign manufacture, if imported into America, may be placed in bonded warehouses without payment of duty, and if exported within three years is exempt from duty. No duty would, therefore, have been payable upon these rails.

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AUSTIN & Co.

The evidence showed that during the months of December, January, and February, there were no English rails in stock at New York, in bond or at all, and that the market price of American rails of a similar kind ranged during the first half of February from 56 to 61 dollars per ton. The defendants had no notice of the sub-contract, or of the fact that the rails were intended for re-exportation to Canada.

Finlay, Q.C., and *Gore*, for the plaintiff, contended that he was entitled to the difference between the contract price and the market price in New York at the date of breach, of American rails of a similar quality and description; at any rate to the loss of profit he had incurred, and the amount of his liability to his sub-purchasers; further, that the sub-contract price at any rate fixed the value of English rails in bond.

Cohen, Q.C., and *Hollams*, for the defendants, contended that before the contract price and the market price could be compared, there must be added to the former the import duty; this would make the contract price higher than the market price, and therefore the damages were nil; that the sub-contract price was no evidence of the market value at the date of *breach*; that as to the loss of profit, and liability of the plaintiff to his sub-purchasers, the defendants could not be made liable, as they were ignorant of the sub-contract.

HIS LORDSHIP held, (1), that the defendants were not liable for the difference between the contract price and the market price in New York of American rails of a similar description, inasmuch as no reasonable man, under ordinary circumstances, would upon breach have bought them against the seller at the price then obtaining; and (2), that the defendants could not be made liable in respect of the sub-purchaser's claim against the plaintiff, as they had no notice of the sub-contract, and continued :—

“ I think the plaintiff is entitled to recover 86*l.* 16*s.* 11*d.*, and the two sums of 10*l.* 12*s.* 8*d.* for cabling, and 42*l.* 4*s.* for inspection.

“ Now the question is, what was the market price of English rails in bond in February, 1882? and the proof was that on November 28th they had been sold at an advance over what the plaintiffs had given to the defendants of 86*l.* There has been no sale at all since then, the plaintiff having

purchased and held the whole stock of English rails in bond in New York.

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"Now it seems to me the price which was given on November the 28th is good evidence of the value at that time, and that in the absence of any evidence to shew the price of English rails in bond has gone down, it is also good evidence of the value in 1882.

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"Now the defendants have produced no evidence at all of their own, but rely upon what they consider to be the weakness of the plaintiff's case. The plaintiff's case is a perfectly good *prima facie* case, and if it were not true, it would have been easy to have shewn that it was not.

"I am of opinion, therefore, that the plaintiff is entitled to my verdict for 917l. 18s. 7d."

Bompas, Bischoff & Dodgson.

Hollams, Son & Coward.

See *Bridge v. Wain*, 1 Stark. 504; *Hughes v. Graeme*, 33 L. J. Q. B. 335; *Borries v. Hutchinson*, 18 C. B. N. S. 445; 34 L. J. C. P. 169; *Elbinger Actien-Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; *Hinde v. Liddell*, L. R. 10 Q. B. 265; *Thol v. Henderson*, L. R. 8 Q. B. D. 457.

MANISTY, J., and a S. J.

BACMEISTER v. FENTON LEVY & CO.

1883.

July 20.

This was an action by the plaintiffs as vendors against the defendants, brokers, for damages for breach of contract to accept a cargo of rice. The material parts of the sold note sent by the defendants to the plaintiffs, were as follows:—

"Sold for account of Messrs. Bacmeister & Co. to our principals of Messrs. Schumacher & Co., through Messrs. Fraser, Linberg & Co., a cargo of rice, &c.

"Brokerage, $\frac{1}{4}$ per cent.

"FENTON LEVY & Co., Brokers."

In the rice trade, a custom exists that, where a broker does not disclose in the contract note the name of the principal dealt with, although he may mention it orally, he is liable on the contract as a principal.

The defence set up was that the defendants were brokers for one Haynes, the real purchaser, and that the note was only made out as a sale "to our principals," instead of to "Haynes," at the plaintiff's own request, as he did not wish his seller to know that Haynes was the buyer.

The plaintiffs adduced evidence to prove a custom in the

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& Co.

rice trade, that the broker is personally liable upon contracts in which the name of the principal is not disclosed in the contract note, although it is mentioned orally.

Patchett, Q.C., and *Milton* (with them *Nasmith*), for the plaintiff.

Finlay, Q.C., and *Church* for the defendants.

MANISTY, J., to the jury:—Does the evidence satisfy you that the custom exists? To entitle the plaintiff to succeed, the contract itself, and the evidence as to custom applicable to such a contract, must satisfy you that the defendants are bound as principals. If you are so satisfied, then you must consider whether in this particular case there was any arrangement, that the defendants should not be liable as principals.

The jury found a verdict for the plaintiff.

W. J. Foster.

W. B. Styer.

That the 17th Section of the Statute of Frauds does not interfere with the right to charge the broker, as principal, in such cases, see *Humfrey v. Dale*, E. B. & E. 1004; Ex. Ch. 27 L. J. Q. B. 390.

It is pointed out by Blackburn, J., in *Fleet v. Murton*, L. R. 7 Q. B. 126, quoting Parke, B., in *Couturier v. Hastie*, 8 Ex. 40; 22 L. J. Ex. 97, that the custom in such cases should be considered as merely regulating the terms of the employment of the broker, and not as incident to the contract of sale. If this means that the custom is incident to the contract of employment (as distinguished from the employment itself), the custom would only enable a principal to charge his own broker, or a broker who has acted for both parties; but would not, if two brokers were employed, enable one principal to charge the other principal's broker, or if only one principal employed a broker, enable the other principal to charge that principal's broker.

1883.

June 20.

A counterclaim in respect of a separate cause of action, is not "a reasonable dispute as to liability" within the meaning of s. 4, s-s. 4 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880.

STEPHEN, J., and a C. J.

DELAROUQUE v. THE SS. OXENHOLME CO.,
LIMITED.

In this action the plaintiff sued for wages, alleged to be due to him from the defendants, for services rendered as purser on the ss. *Oxenholme*. The defendants counter-claimed for damages in respect of negligence, alleged to have been committed by the plaintiff, while in their service as purser. In August, 1882, the *Oxenholme* was chartered by the British

Government to take troops and stores to Egypt. The plaintiff was engaged as purser, at 10*l.* a month wages. In October, 1882, the ship returned to Portsmouth; and on the 21st of that month, the plaintiff's engagement terminated. The Captain of the *Oxenholme* endorsed his discharge "very good," as to ability and conduct; 14*l.* 15*s.* was then due to the plaintiff for wages, which was not paid, the defendants relying upon their counter-claim.

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Sec. 4, s-s. 1, of the Merchant Seamen (payment of wages, &c.) Act, 1880, 43 & 44 Vict. c. 16), enacts that in the case of foreign going ships:—

"The owner or master of the ship shall pay to each seaman on account, at the time when he lawfully leaves the ship at the end of his engagement, 2*l.*, or one-fourth of the balance due to him, whichever is least; and shall pay him the remainder of his wages within two clear days (exclusive of any Sunday, Fast Day in Scotland, or Bank Holiday) after he so leaves the ship."

S-s. 4 provides that "In the event of the seamen's wages, or any part thereof, not being paid or settled as in this section mentioned; then, unless the delay is due to the act or default of the seaman, or to any reasonable dispute as to liability, or to any other cause not being the act or default of the owner or master, the seaman's wages shall continue to run, and be payable until the time of the final settlement thereof."

The defendants admitted their liability for the wages, but contended that a counter-claim was within the meaning of the words "reasonable dispute," in s-s. 4.

Petheram, Q.C., and *W. B. Allen*, for the plaintiff;
Gully, Q.C., and *Kennedy* for the defendants.

STEPHEN, J., held that a counter-claim was not a "reasonable dispute as to liability," within the meaning of the Act; and that to hold that it was, would be to interpolate words which were not in the Act of Parliament. That as the defendants admitted their liability in respect of wages, the plaintiff was entitled to them down to the time of verdict.

As upon the counter-claim the jury found a verdict for the plaintiff, he had judgment for 98*l.* 5*s.* 8*d.*, being the amount of wages calculated to the day of the verdict.

Robert Greening.

W. W. Wynne & Son.

WATKIN WILLIAMS, J., and a C. J.

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July 27.

WESTACOTT v. SMALLEY AND ANOTHER.

The fact that one person writes his name on the back of a bill of exchange, and hands it to another, does not necessarily constitute the former an indorser.

This was an action by the holder of a bill of exchange against the drawer as indorser. The drawer (one Collingridge) had written his name on the back of the bill, and handed the same to the plaintiff. The defence raised was that at the time the bill was drawn, the drawer's name written on the back, and the bill handed over to the plaintiff, it was arranged between the plaintiff and Collingridge, that the latter should not be in any way held liable on the bill.

Spokes for the plaintiff.

Willis, Q.C., for the defendant.

WATKIN WILLIAMS, J., to the jury. Did Collingridge *indorse* the bill to the plaintiff? As a matter of fact, he wrote his name on the back; but you must consider whether by the arrangement, Collingridge was to be liable; if he was not, but his putting his name on the back was mere machinery, to enable the money to be raised, you must find a verdict for the defendant.

The jury found a verdict for the plaintiff.

Taylor & Taylor.

W. Rawlins.

"The liability of an indorser to his immediate indorsee, arises out of a contract between them, and this contract in no case consists exclusively in the writing popularly called an indorsement, and which is indeed necessary to the existence of the contract in question; but that contract arises out of the written indorsement itself, the delivery of the bill to the indorsee, and the intention with which that delivery was made and accepted, as evinced by the words, either spoken or written, of the parties, and the circumstances (such as the usage at the place, the course of dealing between the parties, and their relative situations,) under which the delivery took place." *Per* Maule, J., in *Castrique v. Buttigieg*, 10 Moore's P. C. 94. See, too, Lord Tenterden's direction to the jury in *Pike v. Street*, 1 M. & M. 226.

WATKIN WILLIAMS, J., and a C. J.

BRUNSDEN v. BERESFORD.

1883.

July 31.

THIS was an action by a builder against the owner of a house for the balance alleged to be due under a building contract.

By the contract the architect's certificate was a condition precedent to the builder's right to receive payment for work done. For the work for which payment had been given in this action, no certificate had been given.

The plaintiff's evidence was to the effect that after the work had been completed, the defendant complained of alleged defects therein, and communicated with the architect, telling the latter that he should not accept his certificate unless these alleged defects were attended to and remedied. The evidence on the part of the defendant was to the effect that there had been no such communication at all between the defendant and the architect.

Although the giving of a certificate by the architect be a condition precedent to a builder's right to payment for work done, the builder may nevertheless recover for the work done, if the withholding of the certificate be due to the improper interposition of the employer, who prevented the architect from giving the certificate.

Wheeler for the plaintiff.

W. Allen for the defendant.

WATKIN WILLIAMS, J., to the jury. If you think that the architect acting upon his own judgment withheld this certificate, you must find a verdict for the defendant. If, however, you are of opinion that the withholding of the certificate was due to the improper interposition of the defendant, and that he prevented the architect from giving his certificate, you must find a verdict for the plaintiff.

The jury found a verdict for the plaintiff.

Woodbridge & Sons.

Orans, Bayley & Adams.

See *Latterbury v. Vyse*, 2 H. & C. 432; 32 L. J. Ex. 177; *Clarke v. Watson*, 18 C. B. N. S. 278; 34 L. J. C. P. 148; *Scott v. The Corporation of Liverpool*, 1 Giff. 216; 3 De G. & J. 334; and *Pauley v. Turnbull*, 3 Giff. 20.

LORD COLERIDGE, C.J., and a S. J.

1883.

April 24.

REGINA v. RAMSEY AND OTHERS.

The mere denial of the truth of the Christian religion is not enough to constitute the offence of blasphemy; there must be added a wilful intention to pervert, insult, and mislead others by means of licentious and contumacious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistries calculated to mislead the ignorant and unwary.

THIS was an indictment against William James Ramsey, George William Foote, and Charles Bradlaugh, charging them with having published blasphemous libels in a newspaper called the *Freethinker*, in various numbers of that paper, between the months of March and June, 1882.*

Sir Hardinge Giffard, Q.C., Moloney and Woodfall for the prosecution.

The defendants in person, *Arory and Cluer* being retained to argue points of law on behalf of Ramsey and Foote respectively.

The indictment contained sixteen counts, and the first, second, eleventh, and fourteenth counts were as follows:—

FIRST COUNT.—The jurors for our Lady the Queen upon their oath present that William James Ramsey George William Foote and Charles Bradlaugh being wicked and evil-disposed persons and disregarding the laws and religion of the realm and wickedly and profanely devising and intending to asperse and vilify Almighty God and bring the Holy Scriptures and the Christian religion into disbelief and contempt among the people of this Kingdom on the twenty-sixth day of March in the year of our Lord one thousand eight hundred and eighty-two unlawfully and wickedly did compose print and publish and cause to be composed printed and published a certain scandalous impious blasphemous and profane libel of and concerning Almighty God the Holy Bible or Scriptures and the Christian religion in the form of an article in a printed paper or newspaper called the *Freethinker* containing divers scandalous impious blasphemous and profane matters and things of and concerning Almighty God and of and concerning the Holy Bible or Scriptures and

* The case of the defendant Bradlaugh had, on his application, been previously tried separately on the 10th and 14th of April, before the Lord Chief Justice and a special jury, and he had been acquitted on the ground that there was no sufficient evidence that the publication was by his authority.

of and concerning the Christian religion according to the tenor and effect following that is to say "The God whom Christians love and adore is depicted in the Bible with a character more bloodthirsty than a Bengal tiger or bashibazouk. He is credited with all the vices and scarcely any of the virtues of a painted savage; wanton cruelty and heartless barbarity are his essential characteristics. Now, if any despot at the present time tried to emulate at the expense of his subjects the misdeeds of Jehovah, the great majority of Christian people would denounce his conduct in tones of indignation." And in another part of the said article in the said printed paper there were and are contained certain other scandalous blasphemous impious profane and libellous matters and things of and concerning God the said Holy Scriptures and the Christian religion according to the tenor and effect following that is to say "The friends and favourites of Jehovah were a 'fishey' set, you might boil the lot down without extracting an ounce of virtue from the whole crew; lying and cheating, killing and adultery, were their principal accomplishments, profligacy and piety, praying and priggishness were their chief amusements. Now, if a converted Chinaman were to set about saving his soul by cultivating the friendship of God in this manner, he would be classed as an eccentric cuss by the generality of Christians. The fact that God instigated or condoned these offences in the case of his old pals, would not, in their opinion, justify his more modern friends in emulating their saintly example. Why a God who is the same yesterday, and to-day, and for ever, should have such a weathercock disposition surpasses our feeble comprehension. It would certainly appear from this inconsistency that piety to-day enjoys fewer perquisites, less privileges of crime and plenary indulgences, than it did in the good old times. At any rate, Christians should pause before they venture to denounce those frail mortals who to-day commit the very crimes which God once on a time scandalously licensed for the special behoof of his chartered libertines 'down in Judee,' for such condemnation not only seriously reflects on the character of those godly men, but on that of the obliging Deity who generously took the responsibility and instigated the commission of their crimes." And in another part thereof there were and are contained amongst other

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things certain other scandalous impious blasphemous libellous and profane matters and things of and concerning God the said Holy Scriptures and the Christian religion according to the tenor and effect following that is to say

“Christians, we are afraid, are deficient of that sound common sense and exquisite appreciation of humour which are the sure concomitants of the sceptical mind, otherwise they would laugh outright at the grotesque eccentricity which they honour as their God. Their deity is an arithmetical puzzle, a three-headed curiosity. Instead of hauling away Jumbo, we would advise Mr. Barnum to bid for the Christian Mumbo Jumbo. A greater wonder, a more lasting attraction, could not be found in the heavens above, nor in the earth beneath, nor in the waters under the earth. Mumbo Jumbo is his own father and his own son; but the father and son are not two but one. Yet the father is not the stepfather nor the father-in-law of his son, but only the putative father. The real parent of this interesting child is another person altogether, yclept the Holy Ghost, who, we presume, sold his paternal rights to the other party for a mess of pottage, specially cooked and prepared by the Virgin Mary. The son, therefore, is not the son of the father, except he be his godson. On that point Christian divines differ. The fact is, the son has been merely fathered on the father, which, being interpreted in the vulgar tongue, means that the father was ‘kidded on,’ and for this reason the young hopeful is called even unto this day the Lamb of God.” Which said blasphemous libels the said William James Ramsey George William Foote and Charles Bradlaugh did publish to the great displeasure of Almighty God to the scandal of the Christian religion and the Holy Bible or scriptures and against the peace of our Lady the Queen her crown and dignity.

SECOND COUNT.—And the jurors aforesaid for our Lady the Queen upon their oath further present that William James Ramsey George William Foote and Charles Bradlaugh being evil-disposed persons and wickedly and profanely devising and intending to revile and scandalize Almighty God and religion and to bring God and religion into contempt and ridicule among the people of this kingdom on the 26th day of March A.D. 1882, unlawfully wickedly and maliciously did

compose print and publish or cause and procure to be composed printed and published a certain printed paper called the *Freethinker* in a certain part of which said printed paper to wit at page 99 thereof there were and are contained certain wicked scandalous impious blasphemous and libellous matters of and concerning God and of and concerning religion according to the tenor and effect following that is to say

“The friends and favourites of Jehovah were a ‘fishy’ set. You might boil the lot down without extracting an ounce of virtue from the whole crew. Lying and cheating, killing and adultery, were their principal accomplishments; profligacy and piety, prayer and priggishness, were their chief amusements.

“Now if a converted Chinaman were to set about saving his soul by cultivating the friendship of God in this manner, he would be classified as an eccentric cuss by the generality of Christians. The fact that God instigated or condoned these offences in the case of his ‘old pals,’ would not, in their opinion, justify his more modern friends in emulating their saintly examples. Why a God who is the same yesterday, and to-day, and for ever, should have such a weathercock disposition surpasses our feeble comprehension”: to the great displeasure of Almighty God to the evil example of all others in the like case offending and against the peace of our Lady the Queen her crown and dignity.

ELEVENTH COUNT.—And the jurors &c. do further present that the said William James Ramsey George William Foote and Charles Bradlaugh further to carry out and effect their wicked malicious and blasphemous intentions and designs aforesaid and also for the purpose of vilifying and ridiculing Almighty God and religion and the Holy Scriptures and for the purpose of hurting and wounding the feelings of the people of this kingdom did in and upon the said last-mentioned libellous and printed paper place print and publish a certain wicked scandalous blasphemous and libellous picture so printed and published and having immediately over it the words and figures following that is to say

“Comic Bible Sketches.” And immediately under it the words and figures following that is to say “Divine Mummification. ‘And God said let there be light, and there was light.’—Genesis i. 3.” The said William James Ramsey

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George William Foote and Charles Bradlaugh did represent and did intend to represent Almighty God in a false scandalous wicked blasphemous and libellous manner by representing Almighty God in the said libellous picture under the form of an elderly man attired in a dressing-gown trousers slippers and smoking-cap dancing or standing on his right foot with his left foot in the air and holding a long clay tobacco-pipe to his lips with his right hand while in the left hand he holds a lighted vesuvian or fusee or match. The said William James Ramsey George William Foote and Charles Bradlaugh thereby intending and meaning to excite ridicule and contempt towards and against Almighty God and religion and the Bible and to shock and wound the feelings of the liege subjects of our Lady the Queen within the kingdom to the high displeasure of Almighty God to the evil example of others and against the peace &c.

FOURTEENTH COUNT.—And the jurors &c. that the said William James Ramsey George William Foote and Charles Bradlaugh being evil-disposed persons and intending to bring Almighty God and the Holy Bible into disbelief and contempt to turn Almighty God and the worship of the Deity into ridicule among the people of this kingdom and also wishing to offend and hurt the feelings of the liege subjects of our Lady the Queen did on the 11th June A.D. 1882 print and publish and cause or procure to be printed and published a certain other paper called the *Freethinker* in and upon which there was and is a certain wicked malicious blasphemous and profane libel of and concerning Almighty God and the Holy Bible in the form of a picture therein called and entitled “A Miss and a Hit” having printed and published immediately over the said picture the words following *videlicet* “Comic Bible Sketches.” And having printed under the said picture the words following *videlicet* “And the Angel of the Lord called unto him out of Heaven, and said, Abraham, Abraham. And he said, Here am I. And he said, Lay not thine hand upon the lad, neither do thou anything unto him.—Genesis xxii, 11.” In which said libellous and blasphemous picture Almighty God is represented and intended to be represented or pictured as an old man up in the air who has just been hit in the belly by the discharge of

a gun which a figure representing Abraham holds in his hands and which when Abraham was in the act of discharging it at a lad who stood or stands near or is represented or pictured as standing near with bandaged eyes an Angel is represented as pulling upwards whereby the lad is missed and the figure representing Almighty God is hit in the belly as aforesaid And the said William James Ramsey George William Foote and Charles Bradlaugh published the aforesaid blasphemous and libellous picture with the words and figures aforesaid to the great displeasure of Almighty God to the great scandal and reproach of religion to the evil example of others in the like case offending and against the peace &c.

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It was proved that Ramsey was the registered proprietor and publisher of the *Freethinker* at the times when the alleged libels were published, and that he had sold the papers which contained the libels.

It was also proved that the alleged libels were inserted in the *Freethinker* by the express directions of the defendant Foote.

LORD COLERIDGE. Gentlemen of the jury, the two defendants are indicted for the publication of blasphemous libels; and the two questions which arise for your consideration, are: First, Are these publications in themselves blasphemous libels? Secondly, If they are so, is the publication of them traced home to the defendants so that you can find them guilty?

I will begin with the last question, though it is reversing the logical order, because it is the shorter and more simple of the two. Both questions are entirely for you. When you have heard what I have to say to you as to the state of the law as I understand it, it will then be for you to pronounce a general verdict of guilty or not guilty.

Now for the purpose of this second question, which I deal with first, I will assume for the moment that these are blasphemous libels, but though I assume it now, I will discuss it with you afterwards. Assuming them then to be blasphemous libels, is the publication of them traced home to the defendants? As you are not the same jury who tried Mr. Bradlaugh, it is necessary for me to repeat to you the

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direction on this subject which I gave a few days ago to the jury which tried him. As to the matter of publication, the law has been altered in most important respects by a statute passed early in the reign of the present Queen,—6 & 7 Vict. c. 96. It used to be the law that the proprietor of a newspaper was criminally, not merely civilly, but criminally responsible for a libel inserted in his paper, and that a bookseller or publisher was criminally responsible for a libel in any book which was sold or published under his authority, even though the newspaper proprietor, or the bookseller or publisher did not know of or authorise the insertion of any libel, and did not even know of its existence. But this in the *criminal* law was an anomaly and a grievance which the statute I have referred to was, in its seventh section, intended to remedy. That section came to be considered in the case of *Reg. v. Holbrook*, in which a gross libel on the Town Clerk of Portsmouth had been published in a Portsmouth newspaper. The case was twice tried at Winchester, first before Lord Justice Lindley, and secondly before Mr. Justice Grove. On each occasion the ruling of the Judge who tried the case, was questioned in the Queen's Bench in the time of my predecessor in this seat; on each occasion by the same three Judges, Lord Chief Justice Cockburn, and Mellor, and Lush, JJ.; on each occasion there was the same difference of opinion, the Lord Chief Justice, and Lush, J., holding one way, and Mellor, J., the other. But, notwithstanding this difference of opinion, the case is a binding authority upon me, and I lay down the law to you in the terse and clear language of Mr. Justice Lush. "The effect of the statute," says he (4 L. R. Q. B. 50), "read by the light of previous decisions, and read so as to make it remedial, must be, that an authority from the proprietor of a newspaper to the editor or publisher to publish what is libellous, is no longer to be, as it formerly was, a presumption of law, but a question of fact. Before the Act the only question of fact was, whether the defendant authorised the publication of the paper, now it is whether he authorised the publication of the libel. . . . Criminal intention is not to be presumed, but is to be proved, and in the absence of evidence to the contrary, a person who employs another to do a lawful act, *i. e.*, to publish, is to be taken to authorise him to do it in a lawful and not in an unlawful

manner." Such is now the law laid down in admirable language by great authority; and it is for you to say whether according to the law as so laid down these defendants (either or both of them) did or did not authorise the publication of these libels.

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On the trial of Mr. Bradlaugh this question of fact was the question in the case; he grounded his defence upon the contention, that whatever was the character of the published matter, the publication was not by his authority. That was his defence; and upon that defence, so far as I may presume to assign reasons for the general verdict of a jury, he was acquitted. In the trial before us the process has been reversed. The fact of publication by the defendants has hardly been contested. The evidence is all one way; it is uncontradicted and it is overwhelming. It is proved that the defendant Ramsey sold the papers which contained the libels. It is proved that the articles charged as libellous were inserted by the express direction of the defendant Foote. There is nothing to qualify this proof; the defendants in fact do not deny their liability; and though the case is for you, I do not know that I need refrain from saying that, if upon the evidence you have heard, you think both the defendants liable for the publication of these alleged libels, I shall entirely agree with you.

That however is, comparatively speaking, the least matter you have to decide; for the proof is clear, and it is not disputed. The great point still remains, Are these articles within the meaning of the law blasphemous libels? Now that, as you have been truly told, is a matter absolutely for you. On you is the responsibility, after looking at them and reading them, of saying whether they are or are not blasphemous libels. My duty is to explain to you as clearly as I can what is the law upon the subject. My duty, further, is not to answer the speeches of the defendants, (that is no part of the duty of a Judge,) but to point out to you what in their arguments is in my judgment well founded, and what is not; and then, when you have listened to me, the question is entirely for you. I am sure from my experience of juries that, in a criminal case especially, they will obey the law as declared by the Judge; they will take the law from the Judge, whether they like it or do not like it, and apply it honestly to the facts before them.

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Gentlemen, I have said before, and I take the freedom to repeat, that it is far more important the law should be administered with absolute integrity, than that in this case or in that the law should be a good law or a bad one. The moment juries or judges go beyond their functions, and take upon themselves to lay down the law or find the facts, not according to the law as it is, but according to the law as they think it ought to be, then the certainty of the law is at an end ; there is nothing to rely upon ; we are left to the infinite variety and uncertainty of human opinion ; to caprice which may at any moment influence the best of us ; to feelings and prejudices, perhaps excellent in themselves, but which may distort or disturb our judgment, and distract our minds from the single simple operation of ascertaining whether the facts proved bring the case within the law as we are bound to take it. Forgive me if I seem to press too earnestly upon a special jury of Middlesex these obvious commonplaces. If at my age, with so much to bring about a temper of indifference, with the training which a whole life spent in judicial pursuits ought to have brought with it ; if I feel, as I confess I do, that it is hard in a case like this to be perfectly just and absolutely impartial, it may perhaps be that to some of you at least my earnest warning may not be absolutely useless ; at any rate I am sure you will pardon me for having presumed to utter it.

Gentlemen, you have heard with truth that these things are, according to the old law, if the dicta of old judges, dicta often not necessary for the decisions, are to be taken as of absolute and unqualified authority,—that these things, I say, are undoubtedly blasphemous libels, simply and without more, because they question the truth of Christianity. But I repeat what I said on the former trial that, for reasons which I will presently explain, these dicta cannot be taken to be a true statement of the law, as the law is now. It is no longer true, in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. In the times when these dicta were uttered, Jews, Roman Catholics, Nonconformists of all sorts were under heavy disabilities for religion, were regarded as hardly having civil rights. Everything almost, short of the punishment of death, was enacted against them. The epithet “ferocious,” which has been applied to the statute of William III., to which so

much reference has been made, is hardly stronger than that statute deserves. Jews, it is true, were excluded from Parliament in a sense by accident, for the oath which excluded them was not pointed at them ; but no one can doubt that at that time if it had occurred to anyone that they were not excluded, a law would have been forthwith passed to exclude them. Historically and as matter of fact, such was the state of things when these dicta were pronounced. But now, so far as I know the law, a Jew might be Lord Chancellor, most certainly he might be Master of the Rolls. The great and illustrious lawyer whose loss the whole profession is deploring, and in whom his friends know that they lost a warm friend and a loyal colleague ; he, but for the accident of taking his office before the Judicature Act came into operation, might have had to go circuit, might have sat in a criminal Court to try such a case as this, might have been called upon, if the law really be that "Christianity is part of the law of the land" in the sense contended for, to lay it down as law to a jury, amongst whom might have been Jews,—that it was an offence against the law, as blasphemy, to deny that Jesus Christ was the Messiah, a thing which he himself did deny, which Parliament had allowed him to deny, and which it is just as much part of the law that any one may deny, as it is your right and mine, if we believe it, to assert. Therefore, to base the prosecution of a bare denial of the truth of Christianity, *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows ; and that though the principles of law remain unchanged, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression, I call it progression of human opinion. Therefore, to take up a book or a paper, to discover merely that in it the truth of Christianity is denied without more, and thereupon to say that now a man may be indicted upon such denial as for a blasphemous libel is, as I venture to think, absolutely untrue. I for one, positively refuse to lay that down as law, unless it is authoritatively so declared by some tribunal I am bound by. Historically, I cannot think I should be justified

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in so doing, for Parliament, which is supreme and binds us all, has enacted statutes which make that old view of the law no longer applicable. Nor is it any disrespect whatever to the great men of elder days to hold that what they said in one state of things is not applicable under another.

Gentlemen, when I last addressed a jury on this subject, I put a case to them which I thought was a *reductio ad absurdum* of the argument. I said that if the law was as contended for, it would be enough to say that anything was part of the law of the land, and that thereupon there could be no discussion and no reform; for that to attack any part of the law, however gravely and respectfully, would be, if not blasphemous yet seditious. Monarchy is part of the law of the land, primogeniture is part of the law of the land; the laws of marriage are part of the law of the land, and so forth. But if the doctrine contended for be true, to republish Algernon Sydney, or Harrington, or Locke, or Milton, would expose a man to a prosecution for a breach of the law of libel. But it shows how dangerous it is for some men at least to presume upon their knowledge. What I put as a *reductio ad absurdum* I have since discovered actually occurred, and was decided to be law by a Judge early in the last century. There is a case reported by Lord Chief Baron Gilbert, *R. v. Bedford*, from which it appears that a man was actually convicted of a seditious libel for discussing gravely and civilly, and as the report of the case in Bacon's Abridgment, tit. *Libel*, says, "without any reflection whatever upon any part of the then existing Government," the respective advantages of an hereditary or elective monarchy. I need hardly say that if such a case arose now no Judge would follow that authority, no jury would convict, the whole proceeding would be denounced, and rightly denounced, as altogether monstrous.

It is clear, therefore, to my mind that the mere denial of the truth of the Christian Religion is not enough alone to constitute the offence of blasphemy. What then is enough? No doubt we must not be guilty of taking the law into our own hands, and converting it from what it really is to what we think it ought to be. I must lay down the law to you as I understand it, and as I read it in books of authority. Now, Mr. Foote, in his very able address to you, spoke with something like contempt of the person he called "the late Mr.

Starkie." He did not know Mr. Starkie; he did not know how able and how good a man he was. Mr. Starkie died when I was young; but I knew him, and everyone who knew him knew that he was a man not only of remarkable power of mind, but of opinions liberal in the best sense; and if ever the task of lawmaking could be safely left in the hands of any man perhaps it might have been in his. But, what is more material to the present purpose, the statement of the law by Mr. Starkie has again and again been assented to by Judges as a correct statement of the existing law. I will read it to you, therefore, as expressing what I lay down to you as law in words far better than any at my command.

"There are no questions of more intense and awful interest, than those which concern the relations between the Creator and the beings of his creation; and though, as a matter of discretion and prudence, it might be better to leave the discussion of such matters to those who, from their education and habits, are most likely to form correct conclusions, yet it cannot be doubted that any man has a right, not merely to judge for himself on such subjects, but also, legally speaking, to publish his opinions for the benefit of others. When learned and acute men enter upon these discussions with such laudable motives, their very controversies, even where one of the antagonists must necessarily be mistaken, so far from producing mischief, must in general tend to the advancement of truth, and the establishment of religion on the firmest and most stable foundations. The very absurdity and folly of an ignorant man, who professes to teach and enlighten the rest of mankind, are usually so gross as to render his errors harmless; but be this as it may, the law interferes not with his blunders so long as they are honest ones, justly considering, that society is more than compensated for the partial and limited mischief which may arise from the mistaken endeavours of honest ignorance, by the splendid advantages which result to religion and to truth from the exertions of free and unfettered minds. It is the mischievous abuse of this state of intellectual liberty which calls for penal censure. The law visits not the honest errors, but the malice of mankind. A wilful intention to pervert, insult, and mislead others, by means of licentious and contumelious abuse applied to sacred subjects, or by wilful misrepresentations or artful sophistry,

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calculated to mislead the ignorant and unwary, is the criterion and test of guilt.

“A malicious and mischievous intention, or what is equivalent to such an intention, in law, as well as morals—a state of apathy and indifference to the interests of society, is the broad boundary between right and wrong.”

Now that I believe to be a correct statement of the law. Whether it ought to be or not is not for me to say. I tell you the law as I understand it, leaving you to apply it to the facts of the particular case before you. There was much force, no doubt, in the way in which Mr. Foote dealt with the passage in his address to you. The vagueness, the uncertainty which he insisted upon are possibly, however, inherent in the subject, and there is perhaps more to be said in favour of Mr. Starkie's view than may appear without reflection. There is a passage in his book taken, I believe, from Michaelis, in which it is pointed out with great truth that in one view the law against blasphemous libel may be for the benefit of the libeller himself, who, if there were no law, might find its absence ill exchanged for the presence of popular vengeance and indignation.

“Now to the man who from his heart believes his religion, and regards it as the way to eternal bliss, and as the comfort both of life and death, and who of course wishes to educate his family in the knowledge and belief of it, nothing can be more offensive than to hear another speaking against it, and employing, not arguments (although even these he might let alone, because every man has a right even to err, without our forcibly interfering to rid him of his errors), but insolent and contemptuous language, and blaspheming its gods, its prophets, saints, and sacred things. Were the religion in question only *tolerated*, still the state is bound to protect every person who believes it, from such outrages, or it cannot blame him if he has not the patience to bear them. But if it be the established national religion, and of course the person not believing it be tolerated by the State, and though he enjoys its protection just as if he were in a strange house, such an outrage is excessively gross; and unless we conceive the people so tame as to put up with any affront, and of course likely to play but a very despicable part on the stage of the world, the State has only to choose between the two alternatives, of either punish-

ing the blasphemer himself or else leaving him to the fury of the people. The former is the milder plan; and therefore to be preferred, because the people are apt to gratify their vengeance without sufficient inquiry, and of course it may light upon the innocent.

"Nor is this by any means the treatment which I only claim for the religion which I hold to be the true one, I am also bound to admit it when I happen to be among a people from whose religion I dissent; were I in a Catholic country to deride their saints or insult their religion by my behaviour, were it only by rudely and designedly putting on my hat when decency would have suggested the taking it off; or were I in Turkey to blaspheme Mahomet, or in a heathen city its gods, nothing would be more natural than for the people, instead of suffering it, to avenge the insult in their usual way, that is, tumultuously, passionately, and immoderately; or else the State would, in order to secure me from the effects of their fury, be under the necessity of taking my punishment upon itself, and if it does so, it does a favour both to me and other dissenters from the established religion, because it secures us from still greater evils."

It is not so clear, therefore, that some sort of protection for the constituted religion of the country is not a good thing, even for those who differ from it; for if there were no such protection, the consequences pointed out by Michaelis might too probably ensue. It does not follow that because the objects of popular dislike differ in different ages;—it does not follow (I wish it did) that the populace of our age are much wiser than the populace of earlier times. It is not so very long ago in our history since the populace of Birmingham wrecked the house and burnt the library of Dr. Priestley, a true philosopher, and excellent man. It was not the state which did that, it was the populace. And it is therefore not so clear to my mind that some sort of blasphemy laws reasonably enforced may not be an advantage, even to those who differ from the popular religion of a country, and who desire to oppose and to deny it. Further, therefore, it must not be taken as so absolutely certain that all these laws against blasphemy are in principle tyrannical. Whether, however, they are so or not, if they exist we must administer them, and the prin-

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ciple upon which we are to adminster them is to be found in the passage I have read from Starkie.

But I think I ought to go further, and to say that such study as I have been able to make of the cases has not satisfied me that the law ever was laid down differently from the law as laid down by Mr. Starkie. I do not pretend to have the time or learning to discuss with you exhaustively all the cases on the subject. I have taken a few of the leading ones, speaking roughly a century apart from each other, and I find the law, as I understand it and have laid it down to you, to be laid down practically in the same way in all these cases. It is perhaps worth observing that this law of blasphemous libel first appears in our books—at least that cases relating to it are first reported—shortly after the curtailment or abolition of the jurisdiction of the Ecclesiastical Courts in matters temporal. Speaking broadly, before the time of Charles II. these things would have been dealt with as heresy; and the libellers so-called of more recent days would have suffered as heretics in earlier. But I pass to the cases which are reported. The first of them is a case decided by that great lawyer Lord Hale, of whom Mr. Foote spoke with some respect. He was indeed a man of great intellectual power, of absolute integrity, whose life was that of a Christian saint. If Mr. Foote had read the full report of the trial of the witches before Lord Hale, he would have seen that Lord Hale was there doing what many a judge has had to do, was administering a law he did not like, and so gave to the accused persons every advantage which his great skill in the law fairly allowed him to give; but neither the prisoners nor the jury would take the advantage which he offered them. The case is curious, and he who reads it I think will say that it is a very terse and a very misleading analysis of it, that Lord Hale hung witches because of the language of the Bible; though no doubt the passages in Exodus and Deuteronomy were referred to. Anyone who takes the pains to read the case through will see that, judging him even by the standard of the present day, there is much more to be said for Lord Hale's conduct on that occasion than the run of mankind believe. But in the case of Taylor* (which I cite from Ventris, who was himself a Judge, and who gives the best report) Lord

* Ventris, 293; 3 Keb. Rep. 607.

Hale had the following words before him ; and you must always take a case and an opinion with reference to the subject-matter as to which the case was decided or the opinion given. The words, as Ventris says, were "blasphemous expressions horrible to hear," viz., "that Jesus Christ was a bastard and a whoremaster, that religion was a cheat, and that he feared neither God, the devil, or man." Those were the words on which Lord Hale had to decide in that case, and what he says is this : "Such kind of wicked blasphemous words are not only an offence to God and religion, but a crime against the laws, State, and Government, and therefore punishable in this Court." That is what Lord Hale *held*, in one of the earliest cases on the subject. You may find expressions which seem to go further in the reasons which he gives, but before these cases are so glibly cited as they sometimes are, you should look and see what is the subject-matter of the decision. Lord Hale held "*such kind* of wicked blasphemous words" to be a blasphemous libel, and if they came before me I too should hold them without hesitation to be a blasphemous libel, though I am no more disposed to hang witches than Lord Hale really was.

The next case, on which much stress has been laid, and which is usually cited from *Strange*, though it is more fully and better reported in *Fitzgibbons*, is the case of *Woolston*,* who was convicted of blasphemous discourses upon the miracles of our Lord, and the Court, as reported by *Fitzgibbons*, lay very great stress on what they call "*general and indecent attacks*," and carefully state that they did not intend to include disputes between men on controverted matters. That is the law as laid down by Lord Raymond, a great lawyer, no doubt, and a man of high character, though of much which Lord Raymond says and of many of the expressions in his judgment I think that time and change have destroyed the authority.

There is then the case which is commonly cited as bringing the law down almost to our own time—the case of *R. v. Waddington*, tried before Lord Tenterden, and reported in 1 B. & C. The words of the libel were that "Jesus Christ was an impostor, a murderer, and a fanatic." The Lord Chief

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* 2 *Strange*, 834 ; *Fitzgibbons*, 64 ; *Barnard*, 162.

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Justice laid it down that it was a libel, and a juryman asked the Lord Chief Justice whether a work which denied the divinity of our Saviour was a libel. Now mark the answer given by Lord Tenterden, one of the most cautious and justly respected of men. "He answered that a work *speaking of Jesus Christ in the language referred to* was a libel." That ruling was questioned in the King's Bench before Lord Tenterden himself, and Bayley, Holroyd, and Best, JJ. The three Judges first named were as great lawyers as ever adorned our Bench; and though Best, J., was a much abler Judge than it is now-a-days the fashion to call him, still no one but would consider him the inferior of the other three. But when the case was moved in the King's Bench, Lord Tenterden said, "I told the jury that any publication in which our Saviour was spoken of *in the language used in this publication* was a libel, and I have no doubt whatever that it is so. I have no doubt it is a libel to publish the words that *Our Saviour was an impostor, a murderer, and a fanatic.*" Mr. Justice Bayley says, "It appears to me that the direction of the Lord Chief Justice was perfectly right. There cannot be any doubt that a work *which does not merely deny the Godhead of Jesus Christ, but which states him to have been an impostor, and a murderer*, is at common law a blasphemous libel." Mr. Justice Holroyd says, "I have no doubt whatever that *any publication in which Jesus Christ is spoken of in the language used in this book is a blasphemous libel*, and that therefore the direction was right in point of law." Mr. Justice Best gives a longer judgment, in more rhetorical language but to the same effect, and he concludes, "It is not necessary for me to say whether it be libellous to argue from the Scriptures against the divinity of Christ. *That is not what the defendant professes to do.* The legislature has never altered the law, nor can it ever do so while the Christian religion is considered to be the basis of that law." Now this is the case which is often cited, I must think by those who have not read it, as an authority that any attack upon Christian doctrine, however respectful and decent in language, is by law a blasphemous libel. It is authority, as I think, for nothing of the kind. It binds me here no doubt, and I shall direct you according to what I conceive is its meaning.

There is another case, the last with which I shall trouble you, not indeed exactly in point, but which is sometimes cited in support of the proposition that to attack Christianity is to expose yourself to an indictment for libel. It is the case of *Cowan v. Milbourn*, decided in 1867, and reported in 2 L. R. Exch. 230. It was an action in which the owner of some rooms justified a breach of his contract to let them, on the ground that they were to be used for lectures directed against the character of Christ and his teaching, and the defendant's justification was upheld by the Court. The late Lord Chief Baron undoubtedly goes the full length of the doctrine contended for, and from his reasons, on the grounds I have already stated, I respectfully dissent. But Lord Bramwell puts his concurrence in the judgment on a totally different ground. He bases it on the fact that the statute of William III. is still unrepealed; that these lectures were to be in contravention not of the common law—on that he is silent—but of this statute; and he is careful moreover to point out the distinction between a thing, such as prostitution for example, being “unlawful in the sense that the law will not aid it, which it may be, and yet that the law will not punish it.” So that, if I understand him, his authority cannot be invoked for the proposition that the proposed lectures were necessarily blasphemous libels or the subjects of indictment.

I think, therefore, that any one who calmly and carefully considers the cases will very much doubt whether the old law is really open to the attacks which have been made upon it. I doubt extremely whether if you carefully read through—not merely look at—the cases and master the facts upon which the decisions were pronounced, I doubt if they will be found to be so harsh and illiberal as it has been the fashion in modern times to describe them.

But whether this is so or not, Parliament at least has altered the law on these subjects; it is no longer the law that none but professors of Christianity can take part or have rights in the State; others have now just as much right in civil matters as any member of the Church of England has. The condition of things is no longer what it was when these great judges pronounced the judgments which I think have been misunderstood, and strained to a meaning they do not warrant.

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It is a comfort to think that things have been altered. I observe that in the case of *The Attorney-General v. Pearson*, decided by Lord Eldon in 1817, and reported in Merivale, he expressed a doubt whether the provisions of the 9 & 10 W. III. as to persons denying the Trinity were or were not repealed by a later statute of Geo. III. Some old things, and amongst them this statute, are shocking enough, and I do not defend them; but it must be remembered what was the state of the country when that statute passed—who was the king, what was the succession, what were the factions which divided the country, what were the feelings which naturally agitated Parliament. In these regards the statute is not perhaps defensible, but at least it is explicable. At all events, no man would dream of enacting such a statute now, and I trust that Lord Eldon's doubts will never be solved by a Court pronouncing them to be well founded.

Such are the rules, as I tell you, by which you are to judge of these libels. But further, you have heard a great deal, powerfully put by Mr. Foote, about the inexpediency of these laws in any view of them, and as to the way in which they are worked. To observe on this is the least pleasant part of my unpleasant duty, and I wish I could avoid it. It might perhaps be enough to say that these are things with which you and I have nothing to do. We have to administer the law as we find it, and if we don't like it we should try to get it altered. In a free country, after full discussion and agitation, a change is always effected if it approves itself to the general sense of the community. Mr. Foote has told you that this movement against him and his friends is to be regarded as persecution; and it is true, as he has said, that persecution, unless thorough-going, seldom succeeds. Irritation, annoyance, punishment which stops short of extermination, very seldom alter men's religious convictions. Entirely without one fragment of historical exaggeration, I may say that the penal laws which fifty or sixty years ago were enforced in Ireland were unparalleled in the history of the world. They existed 150 years; they produced upon the religious convictions of the Irish people absolutely no effect whatever. The Irish people could not be exterminated. Everything possible by law short of actual extermination and personal violence was done, and done without the smallest effect. No doubt, there-

fore, persecution, unless it is far more thorough-going than anyone in England and in this age would stand, is, speaking generally, of no avail.

It is also true, that persecution is a very easy form of virtue. A difficult form of virtue is to try in your own life to obey what you believe to be God's will. It is not easy to do, and if you do it, you make but little noise in the world. But it is easy to turn on some one who differs from you in opinion, and in the guise of zeal for God's honour, to attack a man whose life perhaps may be much more pleasing to God than is your own. When it is done by men full of profession and pretension, who choose that particular form of zeal for God which consists in putting the criminal law in force against some one else, many quiet people come to sympathize, not with the prosecutor but with the defendant. That will be so as human nature goes, and all the more if the prosecutors should by chance be men who enjoy the wit of Voltaire, who are not repelled by the sneer of Gibbon, and who rather relish the irony of Hume. It is still worse if the prosecutor acts not from the strange but often genuine feeling that God wants his help and that he can give it by a prosecution, but from partizan or political motives. Nothing can be more foreign from one's notions of what is highminded, noble, or religious; and one must visit a man who would so act, not for God's honour, but using God's honour for his own purposes, with the most disdainful disapprobation that the human mind can form.

However, the question here is not with the motives, of which I know nothing, nor with the characters, of which I know if possible less, of those who instituted these proceedings, but with the proceedings themselves, and whether they are legal. The way in which Mr. Foote defends himself is able, and well worthy of your attention; and you must say, after a few words from me, what you think of it.

Mr. Foote's case, as I understand it, is this (he will excuse me if I do not state it accurately): "I am not going to maintain," says he, "that this is all in the best taste: some of it may be coarse; some of it to men of education may give offence. It is intended to be an attack on Christianity; it is intended distinctly to be an attack on what I have seen attacked in the publications of cultivated agnosticism. It is meant to point out that in the books which your professing

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Christians call sacred are to be found records of detestable crimes, of horrible cruelties, of the lives of sensual, selfish, cruel men, all of which are said to have been pleasing to Almighty God. I do mean to attack your representation of Almighty God. I say your books are not true; I say your religion is what Tacitus called it—a detestable superstition. I mean this, and if I have said it in coarse language, that is because I have not sufficient culture or education to cull my words carefully. But I will bring before you a number of books sold on every bookstall of Mr. Smith, written by persons admitted to the very highest society in the land, in which not only are the same things to be found in point of matter, but I will read you passages in which there is very little difference in manner—passages, for example, from John Stuart Mill, from Grote, from Shelley” (I mention the dead that I may not wound the feelings of the living). “No one ever dreamed of attacking Shelley.” (He is wrong in fact, for Shelley’s publisher was prosecuted, and Shelley himself was deprived by Lord Eldon of the custody of his children.) “I will show you things written by these men quite as strong and quite as coarse, as anything to be found in these publications of mine; and it is plain the law cannot be as suggested, because it can never be true that a poor man cannot do what a rich man may; it cannot be true that you may blaspheme if you blaspheme in civil language.”

Such I understand, put into my own words, to be Mr. Foote’s contention. On that I have two things to say: one in Mr. Foote’s favour, and one against him. He wished to have it impressed upon you that he is not, and never has been, a licentious writer in the sense in which Mr. Starkie uses the word licentious. He has not, he says, pandered to the sensual passions of mankind. You will have the documents before you, and you will judge for yourselves. For myself I should say that in this matter he is right. It is a thing in his favour, and he is entitled to have it said.

But upon the other point, if the law as I have laid it down to you is correct—and I believe it has always been so—if the decencies of controversy are observed, even the fundamentals of religion may be attacked without a person being guilty of blasphemous libel. There are many great and grave writers who have attacked the foundations of Christianity. Mr. Mill

undoubtedly did so ; some great writers now alive have done so too ; but no one can read their writings without seeing a difference between them and the incriminated publications, which I am obliged to say is a difference not of degree but of kind. There is a grave, an earnest, a reverent, I am almost tempted to say, a religious tone in the very attacks on Christianity itself, which shows that what is aimed at is not insult to the opinions of the majority of Christians, but a real, quiet, honest pursuit of truth. If the truth at which these writers have arrived is not the truth we have been taught, and which, if we had not been taught it, we might have discovered, yet because these conclusions differ from ours, they are not to be exposed to a criminal indictment. With regard to many of these persons, therefore, I should say they are within the protection of the law as I understand it.

With regard to some of the others, passages from whose writings Mr. Foote read, I heard them yesterday for the first time, I do not at all question that Mr. Foote read them correctly. I confess, as I heard them, I had, and have, a difficulty in distinguishing them from the alleged libels. They do appear to me to be open to the same charge, on the same grounds, as Mr. Foote's writings. He says many of these things are written in expensive books, published by publishers of known eminence ; that they are to be found in the drawing-rooms, studies, libraries, of men of high position. It may be so. If it be, I will make no distinction between Mr. Foote and any-one else ; if there are men, however eminent, who use such language as Mr. Foote, and if ever I have to try them, troublesome and disagreeable as it is, if they come before me, they shall, so far as my powers go, have neither more nor less than the justice I am trying to do to Mr. Foote. If they offend against the Blasphemy Laws they shall find that so long as the laws exist, whatever I may think about their wisdom, there is but one rule in this Court for all who come to it. This much Mr. Foote may depend upon. So far as I can judge, some of the expressions which he read seemed to be strong, shall I say, coarse?—expressions of contempt and hatred for the generally recognised truths of Christianity and for the Hebrew Scriptures which are said to have been inspired by God Himself. But Mr. Foote must forgive me for saying

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that this is no argument whatever in his favour. Let me explain.

It is no argument for a burglar or a murderer (I mean no offence to Mr. Foote, I should be unworthy of my position if I insulted any one in his)—it is no argument, I say, in favour of a murderer or a burglar that some other person has also committed a burglary or a murder. Because in the infinite variety of human affairs some persons may have escaped, that is no reason why others should not be brought to justice. If he is correct in his citations from these writers, it seems to me that some of them are fairly liable to such a prosecution as his. Suppose they are; that does not show that he is not. What Mr. Foote had to show was not that other people were bad, but that he was good; not that other persons were guilty, but that he was innocent. It is no answer to bring forward these other cases. It is not enough to say these other persons have done these things, if they are not brought before us.

Gentlemen, I not only admit, but I urge upon you, and on every one who hears me, that whilst laxity in the administration of the law is bad, the most odious laxity of all is discriminating laxity, which lays hold of particular persons and lets other persons equally guilty go scot free. That may be, that is so, but it has nothing to do with this case. The question here is not whether other persons ought to be standing where Mr. Foote and Mr. Ramsey now stand; but what judgment we ought to pass on Mr. Foote and Mr. Ramsey, who do stand here.

In short and in fine, we have to administer the law whether we like it or no. It is undoubtedly a disagreeable law, or may become so, but I have given you some reasons for thinking it not so bad nor so indefensible as Mr. Foote has argued that it is. I think it, on the contrary, a good law that persons should be obliged to respect the feelings and opinions of those amongst whom they live. I assent to the passage from Michaelis, that in a Catholic country we have no right to insult Catholic opinion, nor in a Mohammedan country have we any right to insult Mohammedan opinion. I differ from both, but I am bound as a good citizen to treat with respect opinions with which I do not agree.

Take these publications with you; look at them; if you

think they are permissible attacks on the religion of the country you will find the defendants Not Guilty. Take these cartoons. Mr. Foote says they are not attacks upon, and are not intended for caricatures of, Almighty God. If there be such a being, says Mr. Foote, he can have no feeling for Almighty God but profound reverence and awe, but this he says is his mode of holding up to contempt what he calls a caricature of that ineffable being as delineated in the Hebrew Scriptures. That is for you to try. Look at them and judge for yourselves whether they do or do not come within the widest limits of the law. If they do, then as with the libels find the defendants Not Guilty. But if you think that they do not come within the most liberal and largest view that any one can give the law as it exists now, then find them Guilty. Whatever may be the consequences—you may think the prosecution unwise, you may think the law undesirable, you may think no publications of this sort should ever be made the subject of criminal attack (I do not say you do think so, but you may), it matters not—your duty is to obey the law; not to strain it in favour of the defendants because you do not like the prosecution; not to strain it against them because you do not yourselves agree with the statements they advocate, as you are certain entirely to disapprove of the manner in which they advocate them. Take all these alleged libels into your consideration and say whether you find Mr. Foote or Mr. Ramsey, both or either, Guilty or Not Guilty of this publication.

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*The jury being unable to agree, were discharged
without giving a verdict.*

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Lewis & Lewis.

See, too, *R. v. Williams*, Howell's State Trials, vol. xxvi. p. 656; *R. v. Hetherington*, 5 Jur. 529; *R. v. Cartile*, 3 B. & Ald. 161; and the Sixth Report of the Commissioners of the Criminal Law (1841).

CAVE, J., and a C. J.

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RAPLEY v. TAYLOR AND SMITH.

The price realised at a sale by auction of goods seized under a distress is good *primâ facie* evidence of their value.

THIS was an action for an excessive distress against a landlord and a broker. The rent in arrear amounting to 5*l.*, the defendant Taylor, the landlord, instructed the defendant, Smith, the broker, to levy a distress upon the plaintiff's goods. Smith accordingly seized certain goods of the plaintiff's, which were duly appraised at the value of 5*l.* They were then sold by auction and realized 6*l.* 8*s.* 0*d.*

Evidence was adduced on the part of the plaintiff to show that the value of the goods seized and sold was 40*l.*

Bowen Rowlands, Q.C., for the plaintiff.

M'Call and Winch for the defendants.

CAVE, J., to the jury. Under a distress such goods may be seized as are reasonably required to satisfy the rent. The broker might be liable for negligence in not seizing enough, if on sale by auction, enough was not realized to satisfy the rent. The sale is a compulsory one, and therefore you may look at the price likely to be realized on a sale by auction, and this is a good practical test.

The plaintiff must make out that more goods were seized than was reasonably necessary for the purpose of realizing at a sale by auction the amount of rent in arrear and expenses.

The jury found a verdict for the defendants.

F. O'Brien.

J. T. Claxton.

The above ruling agrees with that of Parke, B., in *Wells v. Moody*, 7 C. & P. 59, and is in conflict with the diction of Martin, B., in *Smith v. Ashford*, 29 L. J. Ex. 259. The object of the distress being to realize the rent, it certainly seems that in determining whether the distress be excessive, or not, regard should be had to the probable proceeds obtainable on a realization to which the landlord is compelled to resort, viz., a sale by auction.

LOPES, J., and a C. J.

CRAMER v. GILES AND ANOTHER.

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THIS was an action to recover possession of a piano. By an agreement of the 15th of July, 1879, the plaintiff let on hire the piano in question, on the terms that payment should be made in 12 instalments of five guineas each, one every 3 months, the piano to become the property of the hirer on payment of all the instalments.

The agreement contained the following clause: "In case of default in the punctual payment of any instalment, the instalments previously paid shall be forfeited to J. B. Cramer & Co., who shall thereupon be entitled to resume possession of the instrument, the understanding being that until full payment of the 60 guineas, the piano remains the sole and absolute property of J. B. Cramer & Co., and is only lent on hire; the hirer to take all reasonable care of it during the hiring, and in case of damage by fire or otherwise, bear the loss or risk."

Ten instalments were paid, but default was made in payment of the 11th and 12th instalments, but on the 22nd of May, 1882 (as the jury found in answer to a question left them by his lordship), the remaining 10 guineas was offered to the plaintiffs, but refused by them, and this action was brought.

Wormald for the plaintiffs.

Tindal Atkinson (with him *McIntyre, Q.C.*) for the defendants.

HIS LORDSHIP ruled that time was of the essence of the contract, and that the plaintiffs were entitled to the piano.

G. S. & H. Brandon.

Miller & Miller.

See *Sterne v. Beck*, 1 De G. J. & S. 595. *Protector Endowment Loan Company v. Grice*, L. R. 5 Q. B. D. (C. A.) 592.

WILLIAMS, J., and a C. J.

CROPPER v. WARNER.

1883.

November 10.

Where, after the making of an interpleader order, the sheriff, with the consent of the execution creditor and the claimant, temporarily withdrew from possession. Held, that the goods were no longer *in custodia legis* and the landlord was entitled to distrain upon them, although he knew that the interpleader proceedings were pending.

THIS was an action for the seizure and sale of a printing machine, in which the point arose whether the defendant was entitled to seize and sell the machine under the following circumstances :—

The machine had been let out on hire to one Ballard by the plaintiff, on terms which, in certain events, which happened, gave the plaintiff the right to the possession of the machine, as against Ballard. The plaintiff was also a judgment creditor of Ballard's, and under his instructions the sheriff seized the machine under a *feri facias*. One Willis thereupon claimed the machine; the sheriff interpleaded, and an order was made at chambers on the 28th of December, 1882, that on payment into court by Willis of 50*l.*, the sheriff do withdraw; otherwise the sheriff was to sell, and pay the proceeds into court to abide the event of an issue between the plaintiff and Willis.

By arrangement between the plaintiff, Willis, and the sheriff, the sheriff *at once* withdrew to save the expense of remaining in possession, and in this state of things the defendant, Ballard's landlord, Ballard's rent being in arrear, seized the machine under a distress, on the 1st of January, 1883. The defendant knew at the time of the distress that the interpleader proceedings were pending, and that the sheriff had seized the goods.

Willis's claim was subsequently barred.

Jelf, Q.C., and *Attenborough* for the plaintiff.

Atherley Jones for the defendant.

WATKIN WILLIAMS, J., held that the sheriff having gone out of possession, the machine was no longer *in custodia legis*, and that the landlord was therefore entitled to distrain upon it.

Frith Needham.

F. W. Henry.

See *Wharton v. Naylor*, 12 Q. B. 673. *Blades v. Arundale*, 1 M. & S. 713. In the latter case it does not appear that the landlord knew of the seizure; but knowledge by a man of the facts which give him a legal right, cannot debar him from exercising it.

CAVE, J., and a C. J.

PARNELL v. STEDMAN.

1883.

November 13.

THIS was an Interpleader Issue to try the rights to certain goods seized under an execution by the defendant as execution creditor. The goods were claimed by the plaintiffs in the issue, as the trustees of an ante-nuptial marriage settlement, and the question was whether the settlement was fraudulent and void as against the execution creditor.

To avoid an ante-nuptial marriage settlement as a fraud upon creditors, it must be shown that both husband and wife were parties to the fraud.

By the settlement, one Parnell (the execution debtor) settled all his property, including the business he carried on, on his intended wife. The settlement contained a power to the husband and the wife at any time to dispose of the settled property, as they thought fit. The trustees of the settlement were the intended wife and the clerk who assisted Parnell in carrying on his business. Parnell had only been acquainted with his wife for 3 weeks previously to the marriage. She deposed that before the marriage she had asked him to make a settlement upon her, and that the settlement in question was thereupon executed, in the preparation of which she had no independent advice. After the marriage, the business was carried on by the clerk as before, but on behalf it was alleged of the wife instead of the husband. The name of the firm remained the same, but notice was given to the customers of the alteration in its constitution.

Beddall for the plaintiffs referred to *Columbine v. Penhall*, 1 Sm. & Giff. 228 : and *Bulmer v. Hunter*, L. R. 8 Eq. 46.

Reed for the defendant.

CAVE, J. (to the jury), after observing that it was difficult to see what Parnell's intention and object could have been except to defeat creditors, continued.

"But that is not sufficient; to avoid this instrument you must consider what was the intention of Mrs. Parnell. If she stipulated for a settlement and Parnell took advantage of

1883.

PARNELL
v.
STEDMAN.

this to settle his whole property upon her, yet if she merely honestly intended to obtain a provision for herself, and did not quarrel with its being a large one, the marriage settlement will not be void. To avoid it you must be satisfied that Mrs. Parnell concurred with Parnell in the object of defeating creditors, and was willing that in all other respects the deed should be inoperative."

Verdict and judgment for defendant.

E. Hart Smith.

Digby & Digby.

CAVE, J.

1883.

November 17.

ESPIR v. TODD.

Where premises were let as a jeweller's shop to be occupied during hours of business only. Held, that the landlord was, in the absence of express stipulation, under no liability for a loss occasioned by robbery during the night, even though the premises were insufficiently protected.

THIS was an action to recover damages for the loss of certain jewellery, stolen from premises let to the plaintiff by the defendant. The material parts of the agreement of tenancy were as follows:—

"The tenant agrees not to use the said premises for a dwelling house or sleeping apartment, nor for carrying on any trade or business other than that of a jeweller or other similar occupation, and to occupy the said premises during ordinary hours of business only. Not to permit any sale by auction to take place upon the premises; not to pull down or alter the construction or arrangement of the said premises, nor cut or injure the timber or floors, nor deface or disfigure the walls or ceiling.

"The tenant will pay weekly to the beadle or housekeeper for the time being employed by the landlord upon the said arcade the sum of 1s. 6d. per week.

"And the tenant hereby further agrees at all times during the tenancy to keep the plate-glass front of the said shop and premises duly insured against accidents, and to keep the door and shutters in good working order."

The premises consisted of a shop situated in an Arcade running between two streets. The Arcade was closed at each

end by gates 7 feet high, but the entrance to it at one end is about 13 feet in height, and the entrance at the other is 10 feet in height, leaving spaces of 6 feet and 3 feet respectively between the top of the gate and the top of the entrance, wholly unprotected.

Between the hours of 10 p.m. and 7 a.m. no one remained in the Arcade to take care of it, nor was it during those hours open to the inspection of the police. There were no shutters to the shop windows of the demised premises.

During the night of the 15th of December, 1882, thieves broke into, and stole jewellery of the plaintiff's on, the premises of the value of £200.

Wilberforce for the plaintiff, contended that there was a duty cast upon the defendant under the circumstances to provide a proper and sufficient protection to the premises during the night, and that he had failed in this duty and must be held liable for the consequences. He cited *Lax v. Mayor, &c. of Darlington*, L. R. 5 Ex. D. 28 C. A.: and the observations of *Kelly, C. B.*, in *Carstair v. Taylor*, L. R. 6 Ex. at p. 220, upon the case of *Francis v. Cockrell*, L. R. 5 Q. B. 501. He also relied upon the statement of the law as to the liability for breach of duty, laid down by *Brett, M. R.*, in *Heaven v. Pender*, L. R. 11 Q. B. D. p. 509.

Tyrrell Paine for the defendant.

CAVE, J.—I cannot see that there was any liability on the part of the landlord, nor does any authority go the length contended for: The plaintiff was aware of all the circumstances, and if he thought the premises unsafe, he should have stipulated for further precautions before taking the shop. He did not do so. The maxim *res perit domino* applies.

West King Adams & Co.

Badham & Williams.

1883.

ESPIR

v.
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POLLOCK, B.

1883.

November 21.

FOULKES v. QUARTZ HILL CONSOLIDATED GOLD MINING CO.

Where after issue joined and notice of trial given in an action by a shareholder to have his name removed from the register of shareholders on the ground of fraud, the plaintiff attended and voted at a meeting of shareholders held in the liquidation of the company. Held to be conduct which debarred the plaintiff from prosecuting his action for fraud.

THIS was an action by a shareholder in the defendant Company against the Company, claiming to be removed from the register on the ground of fraud, and for repayment of the amount paid on his shares. One defence raised was that the acts of the plaintiff after discovery of the alleged fraud amounted to an election to keep the shares. With respect to this, the facts were as follows:—

The writ in the action was issued on March 31st, 1882. The statement of claim was delivered on July 29th, 1882. Defence on November 13th, 1882. Reply on December 12th, 1882. Notice of trial was given on the 12th day of March, 1883.

The voluntary liquidation of the Company had commenced since the action was brought, but the action was nevertheless continued.

On the 3rd of November, 1883, a meeting of shareholders was convoked by the liquidators to pass the liquidation accounts; at this meeting the plaintiff attended and voted.

Jelf, Q.C., and *Dunham* for the plaintiff.

Murphy, Q.C., and *Seward Brice* for the defendants.

POLLOCK, B.—In these cases of Companies the considerations are not altogether the same as in the case of contracts *inter partes*. A man becomes a shareholder, and other shareholders are interested. Hence it is important a man should show unequivocally his intention to be released. The issue of the writ was not a definite election to rescind, and on November 3rd, 1883, the plaintiff goes to a meeting of shareholders and votes, whereby he and other people are affected. This is an election. There must be judgment for the defendants.

Beall & Co.

Snell & Greenip.

See *Reid v. North Staffordshire Insurance Company*, W. N. November 17th, 1883.

The Court of Appeal reversed the above decision, holding that the issue of the writ was a definitive election to rescind, and that this election was not affected by the subsequent voting at the meeting.

CAVE, J., and a C. J.

TOPPIN *v.* BUCKERFIELD AND CROSS.

1883.

November 7.

THIS was an action by the trustees of a marriage settlement, against a High Bailiff and an execution creditor for an illegal seizure and detention of goods.—On July 19th, 1882, Cross, having obtained a judgment in the County Court, against one Bishop, delivered a warrant to the High Bailiff on the 18th of September, directing him to seize in execution the goods of Bishop.

The High Bailiff accordingly, on the same day, caused possession to be taken of certain goods at Bishop's house. The man in possession was informed upon entry that Bishop had been adjudicated bankrupt, and that part of the goods on the premises were vested in the trustees of Mrs. Bishop's marriage settlement, and notice was also given to the High Bailiff himself, by letter of the 21st of September, of the bankruptcy and settlement. On the 22nd of September the High Bailiff removed the goods, and on the 25th of September an interpleader summons was taken out by the High Bailiff, and came on for hearing at the County Court on the 10th of October, but the summons was dismissed on the objection being taken by the execution creditor and the High Bailiff, that the claimant had not delivered particulars of his claim 5 clear days before the hearing, pursuant to the County Court rules, 1875, Order 21, Rule 2. The bailiff retained possession of the goods till the 24th of October, 1882, when, in pursuance of an order in this action, the goods were returned to the plaintiffs upon their undertaking that the same should be preserved.

Where, on a claim being made to goods seized by a bailiff, the execution creditor does not direct the bailiff to give up the goods to the claimant, but appears and contests his title in interpleader proceedings. Held, no evidence of a ratification by the execution creditor of the bailiff's detention.

Bowen Rowlands, Q.C., and M'Intyre for plaintiffs.
Addison, Q.C., and J. J. Sims for defendant Cross.
Winch for the High Bailiff.

At the close of the Plaintiffs' case.

Addison, Q.C., submitted that there was no case to go to

1883. the jury, as against the defendant Cross, inasmuch as he
 TOPPIN had only instructed the High Bailiff to seize the goods of
 v. Bishop. He cited *Cronshaw v. Chapman*, 31 L. J. Ex. 277.
 BUCKERFIELD & (CAVE, J.—It is clear that Cross is not liable in this case for
 CROSS. the original seizure.) Nor can he be made liable, as having
 ratified the seizure: *Wilson v. Tummins*, 6 M. & G. 242; the
 execution creditor cannot be made liable for acts done after
 the commencement of the interpleader proceedings: *Woollen v.*
Wright, 1 H. & C. 554; 31 L. J. Ex. 503, *Walker v. Olding*,
 32. L. J. Ex. 142.

Bowen Rowlands, Q.C.—*Walker v. Olding* is distinguish-
 able. There, an interpleader order was made, and the ques-
 tion of liability was not in dispute. Here, no order was
 made, and there is sufficient evidence of a ratification of the
 detention.

CAVE, J.—It is clear that the execution creditor cannot be
 made liable here for the original seizure, for it was Bishop's
 goods that he directed the High Bailiff to seize. As to the
 detention, there is here no proof that it was at Cross's request
 that the High Bailiff detained the goods, or of any demand
 upon Cross to give them up. He did not, indeed, tell the
 High Bailiff to give them up, but no action will lie against him
 for not doing this.

G. F. Hird

E. Tadman.

Willoughby & Winch.

The effect of an order made upon the hearing of the interpleader
 summons is to bar any claim for damages, unless made at the hearing
 of the summons. See *Death v. Harrison*, L. R. 6 Ex. 15. On the
 above summons, it will be observed no order was made upon the merits.

[The action against the High Bailiff failed, on the ground that he had received no notice of action as required by 9 & 10 Vic. c. 93, s. 138.]

CAVE, J., and a C. J.

JONES v. ASHWIN AND IVORY.

1883.

November 22.

THIS was an action for goods sold and delivered. The goods had been supplied to the Members' Mansions, Victoria Street, upon the orders of the housekeeper. The claim against the defendant Ashwin was that he was the owner and proprietor of the establishment. The claim against the defendant Ivory, who was secretary and manager, was that goods supplied by the plaintiff had in previous instances been paid for by cheques of Ivory's, signed by him "Members' Mansions Account."

Where a tradesman claims against the real purchaser of goods in the same action that he claims against a person who held himself out as the purchaser. Held, that the claim against the latter cannot be sustained.

Witt and Browne for the plaintiffs.*L. C. Jackson* for Ashwin.*Kemp, Q.C., and Erichsen* for Ivory.

CAVE, J., referred to *Scarf v. Jardine*, L. R. 7 Appeal Cases, 345, and ruled that there was no case to go to the jury against Ivory, as the claim against him was based on his having held himself out as the owner of the Mansions, whilst Ashwin was the real owner. The plaintiff could not under these circumstances sue both defendants together, and having with full knowledge of the facts sued Ashwin the real owner he could not at the same time proceed against Ivory, whose liability depended only on estoppel.

*Lumly & Lumly.**A. Kisch.**Newman & Co.*

CAVE, J., *alone*.

1883.

*November 19.*SMITH *v.* DRUMMOND.

A vessel was lost through stress of weather, and without negligence. Held, in the absence of express stipulation, that there was no liability implied by law on the part of the person in possession for a loss so occasioned.

THIS was an action by the plaintiff against the executors of Robert Drummond for damages for the loss of a steam launch.

On the 2nd August, 1880, an agreement was made between the plaintiff and Drummond for the charter of the steam launch in the following terms:—"Memorandum of agreement between Robert Drummond, etc., and J. Smith, etc., for charter of s.s. *Emily* for three months from Monday, August 16th, 1880; rent of launch £33, insurance of same payable by Mr. Drummond when ascertained, as also wages, fuel, and expense of sending yacht round to Dornoch Frith and taking her back to Inverness. I (the plaintiff) will select engineer, who will be responsible for boiler and machinery, but wages payable by Mr. Drummond."

The launch proceeded from Inverness to Dornoch Frith under the agreement, in charge of an engineer in the employ of the plaintiff, whose wages were paid by Drummond. After using the launch for three months, Drummond left her at Dornoch Frith in charge of the engineer and a man in his own employ. In consequence of bad weather the yacht could not be taken back to Inverness, and on the night of the 17th December she sank at her moorings at Dornoch Frith.

Pyke, for the plaintiff, contended that under the charter-party the defendant was in possession of the launch, and that such possession continued in him until the yacht was returned in safety at Inverness at the expiry of the terms of hiring. He cited *Sandeman v. Scurr*, L. R. Q. B. 86.

Grantham, Q.C., and *Tatham* for the defendant.

CAVE, J.—It is admitted that there has been no negligence in this case; unless, therefore, the plaintiff can make out that the defendant has either expressly or impliedly undertaken to bear the loss, the maxim *res perit domino* must apply, and the loss fall upon the plaintiff. I construe this agreement as meaning that Drummond was entitled to the use of the

launch for three months at Dornoch Frith. It seems to me that the stipulations providing for the payment of wages, fuel, and expenses of sending from Inverness to Dornoch and back from Dornoch to Inverness, would have been unnecessary if the period during which this was to take place had been included in the three months. This view is confirmed by the fact that the plaintiff himself effected the insurance on behalf of Drummond, and did this for three months only. Express or implied liability then arising from the agreement, I can see none, but it is contended that the liability must be implied in law from the mere possession of the ship. The answer to that is that where such a liability is implied by law, a loss happening by the act of God is excepted, therefore, even assuming this contention is correct, it fails in this case. There must be judgment for the defendant.

Pyke & Minchin.

Fladgate, Smith, & Fladgate.

See *Williams v. Lloyd*. *W. Jones*, 179, and the exposition of the law as to the liability of the hirer of goods, by Blackburn, J., in *Taylor v. Caldwell*, 32 L. J. Q. D. at p. 166.

WILLIAMS, J.

HALL v. THE WEST-END ADVANCE CO., LIMITED.

1883.

November.

THE facts and arguments fully appear from the judgment of the learned judge.

Ashton Cross for the plaintiff.

Lawrance, Q.C., and Wyatt Hart for the defendant.

W. WILLIAMS, J.—This case was tried before me without a jury, and I now proceed to give judgment.

The action was brought to obtain a declaration of title to

the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance. The plaintiff gave notice of his interest to the insurance company before the defendants. Held, that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to estop him from asserting his claim against the defendants.

The plaintiff, mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose. On the plaintiff demanding it back from time to time, the mortgagor made excuses for not doing so; and

1883. and also to recover possession of a Policy of insurance for 800*l.*
 HALL upon the life of one George Edward Smith, in the Standard
 v. Life Assurance Company.
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The facts are short and simple, and are as follows :

In the year 1873, two ladies, then resident in Paris, had a claim against George Edward Smith, who occupied a responsible post in the General Post Office in London, and in June of the same year an agreement was come to between them for the settlement of this claim, by which Smith agreed to pay them a certain annuity during their lives, and to assign for their benefit a Policy of insurance, which he possessed upon his life in the Standard Insurance Company.

Hall, the plaintiff, who acted as solicitor for these ladies, was a party to the agreement, and consented to become their trustee and to hold the Policy for them, and the Policy was then handed over to Hall for that purpose.

A formal deed was then drawn up between all the parties for the purpose of carrying out this agreement. This deed was dated 12th of June, 1873, and was at once executed by the ladies and by Hall, and it contained amongst other things a formal assignment of the Policy to Hall, in whose possession the Policy then was.

Smith delayed executing the deed, and did not execute it until August 2nd, following.

In the mean time, namely, in July, 1873, it was discovered that there was a slight inaccuracy in the Policy, which it might be desirable to have corrected, namely, that whilst Smith's real name was George Edward, he was described in the Policy as Edward only, and it was also considered desirable that in order to perfect the security an admission of the date of Smith's birth should be endorsed upon the Policy ; and thereupon Smith asked Hall for the Policy, that he might put both matters right, and Hall handed him the Policy for that purpose.

From this time Hall from time to time pressed Smith to complete the security, but Smith delayed the matter, stating that the Insurance Company had not yet put the Policy right ; and as before referred to, on the 2nd August, 1873, Smith called upon Hall and executed the deed of assignment. Smith, however, did not then return the Policy, excusing his not doing so upon the ground that the Company had not yet

made it right, and he made the same excuse upon several subsequent occasions when asked by Hall for the Policy. There is no reason to believe that the excuses were not true. Smith, however, never returned the Policy to Hall; but he continued to pay the annuity regularly down to 1878, and Hall forgot all about the Policy not having been returned.

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In 1878, Smith failed to pay the annuity, and Hall having then made enquiries respecting him, found that he had disappeared for some time.

Hall, thereupon, on the 26th April, 1878, for the first time, served a notice of the assignment upon the Standard Insurance Company.

The premiums upon the Policy were due in January of each year, the last day for payment being the 11th January.

From the time of Hall's discovery of Smith's disappearance he from this time made enquiries of the Insurance Company as to the payments of the premiums, and on two occasions, namely, in January, 1882, and January, 1883, finding that the premiums were unpaid, paid them upon the last day.

Hall at this time, thinking it desirable to surrender the Policy to the Insurance Company, entered into negotiations with them for that purpose, and in the course of these negotiations discovered that the Policy was missing, and supposed that he had mislaid it; when on the 8th January, 1883, he received notice from the Insurance Company that the Policy was in the possession of the defendants, the West-End Advance Company, Limited.

The plaintiff then demanded the Policy from the defendants, who refused to deliver it up, and set up a right to retain it, founded upon the following facts:—

In May, 1875, before Hall had given notice of his assignment to the office, Smith applied to the defendants for a loan and obtained an advance of 100*l.*, upon security of two promissory notes for 50*l.* each, and deposited the Policy with them as collateral security.

In August, 1875, the first note became due and was dishonoured, and the defendants pressed Smith for a proper security, and Smith then signed an agreement undertaking to assign the Policy to them as security, leaving the Policy in their hands. Subsequently the defendants paid to the Insurance Company the premiums due upon the policy in

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January, 1877, 1878, 1879, 1880, and 1881; and in 1877 and 1878 they paid the premiums after the last day for paying them, and paid an additional sum to save the policy from lapsing, but upon none of these occasions did they give any notice of any sort or kind of their charge upon the Policy.

On the 5th of July, 1883, and long after the plaintiff had given his notice to the Insurance Company, and had paid at least one premium; the defendants produced the Policy to the Insurance Company, and afterwards on the 31st March, 1883, gave a formal notice of their charge.

Under these circumstances the present action was brought, and the plaintiff based his claim upon the undoubted and undisputed fact that he was the assignee of the Policy, and had given notice of his assignment to the Insurance Company before the defendants had given notice of their equitable charge. It was admitted by the plaintiff that after he had become possessed of the Policy, he had returned it to Smith, but it was alleged by the plaintiff, and not disputed by the defendant, that this was done for a perfectly proper and legitimate purpose, but it was further admitted by the plaintiff that he had neglected for some years afterwards to take efficient steps to obtain a return of the Policy from Smith, and that, in fact, he forgot all about it, and allowed Smith to remain in possession of it; and so in a certain sense enabled Smith to deal with it and deposit it as security with the defendants. The plaintiff still further neglected to give notice to the Insurance Company of the assignment to him, and the defendants, also, when they made their advance and took the Policy as security, neither made any enquiry at the office of the Insurance Company, nor gave them any notice of their charge.

Upon this state of facts it was contended on behalf of the defendants that they were entitled to retain their security upon the principle of equity, that when one of two innocent persons must suffer by the fraud of a third, the loss should fall upon him who enabled such third person to commit the fraud. Without disputing the entire accuracy of this as a sound legal maxim capable of being illustrated by numerous cases, it cannot be denied that without some explanation of the term "enabled," the maxim is rather wide and vague, and is liable to be misleading when appealed to as a practical

guide, in the cases where there is any difficulty in determining which of the two innocent persons ought to suffer.

In cases of dispute as to the right and title to property, whether real or personal, and including in the latter assignable choses in action, we start with this general principle, that as a rule, although one may by his carelessness lose the possession of his property, he does not forfeit his title, or his right to regain possession by reason only of his having been careless in the custody of it, or of his documents of title, and by some one fraudulently taking advantage of this carelessness to sell the property to another. The cases of negotiable instruments, coin of the realm, and goods sold in market overt are subject to different considerations.

In the case of property generally, if the original and true owner has taken no direct part in the transaction itself by which the subsequent purchaser has been deceived, nor has placed the fraudulent person in a position of ostensible authority to do what he has done, nor been guilty of any breach of duty towards the deceived person, causing him to be deceived, then he will not be postponed to the latter, simply because it can be shown that he has been careless or remiss in relation to the custody of his title deeds, and that this has indirectly led to the subsequent purchaser being deceived by the fraudulent act of another person who is in possession of the deeds. These principles are fairly deducible from the cases of *Freeman v. Cooke*, 2 Ex. 654; *The Bank of Ireland v. Trustees of Evans Charity*, 5 H. of L. 389; and *Swann v. The North British Australasian Company*, 2 H. & C. 175. The doctrine deduced from these authorities is generally referred to as the doctrine of estoppel, by which a person is estopped by his conduct from setting up his true title.

Where the estoppel is sought to be rested as in the present case upon negligence on the part of the original owner, two things must be established in order to create the estoppel: first, the act of neglect, must be the neglect of some duty owing by the party to be estopped to the aggrieved person; and, secondly, this neglect must be the real and proximate cause of the aggrieved person being deceived. To use the language of Lord Blackburn, (a) "the neglect must be in the transaction itself,

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(a) *Swann v. The North British Australasian Co.*, 2 H. & C. 175.

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and be the proximate cause of leading the party into that mistake, and must be the neglect of some duty that is owing to the person led into that belief, or, what comes to the same thing, to the general public of whom that person is one, and not merely neglect of what would be prudent in respect to the party or himself, or even of some duty owing to third persons with whom those seeking to set up the estoppel are not privy."

Now in the present case the plaintiff Hall, when he handed the policy to Smith cannot properly be considered to have been guilty of any carelessness or negligence towards anyone. The policy was handed to Smith, for a very natural and legitimate purpose, and in order that the assignment might be perfected. In forgetting to demand the return of the policy from the Insurance Company, it may well be conceded that Hall was careless, and that he neglected a duty that he owed to his *cestui que trusts*: but was he guilty of negligence in his relation to the defendants, as one of the public who might be misled and deceived by Smith making a fraudulent use of his possession of the policy? and of such negligence as was the direct and proximate cause of defendants being deceived? It seems to me that he was not. He properly handed the policy to Smith, for a purpose that would not have authorised him in dealing with it in any way, and he afterwards by mere forgetfulness permitted the policy to remain in Smith's possession. He neither did nor said anything to induce the defendants to believe that he had entrusted Smith with the policy with the power of disposing of it, unless indeed the mere fact of Smith being in possession of it was sufficient to induce and justify such belief; but it seems to me impossible to maintain such a contention, because if that were so it would have applied with equal force, if Smith had taken the policy and pledged it with the defendants the very day after he had received it: and this would in my opinion, have not deprived the plaintiff of his right. See *Ex parte Reid*, 17 L. J. Bank. p. 19, where V.-C. Knight Bruce decided in favour of the original assignee, as against the subsequent incumbrancers who had possession of the document of title.

It appears to me, that the plaintiff's carelessness in allowing the policy to remain in Smith's hands, is too remote and indirect a cause of the deception practised upon the defendants

by Smith, to make it correct to say that the plaintiff enabled Smith to commit the fraud within the true meaning of the maxim, and that his neglect to give notice to the Insurance Company had no effect at all, either proximate or remote, owing to the defendants' neglect to make inquiries, or give notice on their part.

Nor does this conclusion result in the present case in anything that can properly be regarded as any hardship upon them, because by the exercise of reasonable care and diligence upon their part they might have escaped loss. If when Smith negotiated the loan with them and deposited the policy as security, they had made inquiry and given notice to the Insurance Company, one of two things would have followed; either they might have learned that Smith had assigned the policy, in which case they would have declined the security, or if they had been informed that the policy was free and unincumbered, they might by giving notice to the Insurance Company have gained priority over the first incumbrancer who had neglected to give notice. If therefore the defendants sustain a loss they must feel that it is quite as much due to their own neglect and want of care as to the plaintiff's original carelessness. I think, therefore, the judgment must be for the plaintiff as prayed, with costs.

Denton, Hall, & Burgin.

Flegg & Son.

See also, as to the doctrine of estoppel by negligence, and its limits, *Bazendale v. Bennett*, L. R. 3 Q. B. D. at p. 530, per Bramwell, L. J.; *Arnold v. Cheque Bank*, L. R. 1 C. P. D. 586—587, per Lord Coleridge; and *Taylor v. Great Indian Peninsular Railway Company*, 4 De G. & J. 559; 28 L. J. Ch. 285, 709.

An application was subsequently made to the learned judge by the plaintiff to amend the judgment by adding or substituting one Shaw, the liquidator of the defendant company, as a defendant, and to order him to pay the costs of the action personally.

On Oct. 4, 1883, a special resolution to wind up the company voluntarily was passed, and also a resolution appointing Shaw liquidator. These resolutions were confirmed on Oct. 25, 1883, and registered on Oct. 27th. Shaw's appointment was Gazetted on Oct. 30th; the trial took place on Nov. 20th, and judgment was delivered on Dec. 3rd. On Dec. 8th the plaintiff first heard of the liquidation.

Ashton Cross, in support of the motion, cited *The Madrid Bank*

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- v. *Bayley*, L. R. 2 Q. B. 37; *In re Smith v. Bank of Hindostan*, *Ex parte Smith*, L. R. 3 Ch. App. 125; *Ex parte Levick*, 5 Eq. 69; *Watson v. Holliday*, L. R. 20 Ch. D. 780; 31 W. R. 546, C. A.; Companies Act, 1862, sect. 133, subsects. 5 and 7, and sects. 85 and 95. *Wyatt Hart* opposed the motion, and cited *In re Poole Firebrick and Blue Clay Company*, L. R. 17 Eq. 268.

Williams, J.—This application must be dismissed with costs. It is misconceived, and there is no foundation for it on either principle or authority. The effect of the appointment of a voluntary liquidation is to bring the company to a standstill, and business can no longer be carried on, except for the purpose of collecting assets for distribution. Instead of directors and a board, the liquidator has the management of the machinery. In this case the liquidator found an action ripe for trial, and though the defence failed, it was in my opinion a very proper defence on behalf of both shareholders and creditors. It has, however, been urged that Shaw ought to have informed the plaintiff of the liquidation, and of his appointment as liquidator. He has, however, been guilty of no misrepresentation, he has been merely reticent. But even if he had been guilty of a dereliction of duty, that is not a reason for making him a defendant for the sole purpose of making him personally liable for costs.

WATKIN WILLIAMS, J., and a C. J.

1883.
 November 6.

FOSTER, HIGHT & CO. v. WARD AND OTHERS.

No action will lie by a firm as indorsees of a bill of exchange against their indorsers, if a member of the plaintiff's firm be one of the indorsers.

THIS was an action by a firm as indorsees of a bill of exchange against the defendants, the drawers, and indorsers. One member of the plaintiff's firm was himself one of the indorsers.

Russell, Q.C., Petheram, Q.C., and Winch, for the plaintiffs.
Willis, Q.C., and Moulton, for the defendants.

WATKIN WILLIAMS, J., held, upon the authority of *Mainwaring v. Newman* (2 B. & P. 120) that the plaintiffs could not, under the circumstances, maintain the action.

Champion, Robinson, & Poole.

Rooks & Co.

See Byles on Bills, 13th Edit. pp. 42—44, and the cases there referred to. See, too, Lindley on Partnership, 4th Edit. pp. 1022—1031.

POLLOCK, B.

MAYOR AND CORPORATION OF LONDON v. LORD
AND LADY BROOKE.

1883.

December 4.

In this action, a point arose as to the liability of the separate estate of the female defendant under the following circumstances :—

The female defendant before her marriage was the Lady of the Manor of certain lands, and the freeholder of certain copyholds forming part of Epping Forest. The plaintiffs claimed certain rights of common over those lands, and by the Epping Forest Act, 1878, the question of the compensation payable by the female defendant to the plaintiffs for a release of such rights, was referred to arbitration. Pending the arbitration, the defendants married one another in April, 1881. In September, 1881, the arbitrator made his award, awarding that Lady Brooke should pay the plaintiffs 86*l.* 18*s.* 4*d.*, and that thereupon she was to be quieted in title and released from all rights of common claimed by the plaintiffs. No evidence was given as to whether or not any property had been brought into settlement on the marriage.

Where a woman married when proceedings were pending between her and others, which resulted, after her marriage, in a statutory debt being created : Held, that her separate property was chargeable with the payment of such debt.

E. Clarke, Q.C., and Danckwerts for the plaintiffs.
Lawrence, Q.C., and Moorsom for the defendants.

POLLOCK, B.—It is admitted on the pleadings, and stated in the award, that Lady Brooke is Lady of the Manor and the freeholder ; the question is—Is her separate estate chargeable with the payment of the money now claimed ? The property has received a benefit by the quieting of her title, and she has been ordered to pay a debt created by statute. There must therefore be an inquiry as to the separate estate.

*City Solicitor.**Walfords.*

CAVE, J., and a C. J.

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ARMFIELD v. LONDON AND WESTMINSTER BANK.

Where a bank has, as a matter of fact, always treated cheques paid in by a particular customer as cash before clearance, it cannot, as against such customer, set up a usage entitling it to exercise a discretion as to whether each particular cheque should be so treated.

THIS was an action by a customer against the bank for wrongfully refusing to pay a bill of exchange accepted by him, payable at the defendants' bank.

The defence set up was, that the bank had not sufficient funds in hand to meet the bill save by crediting the plaintiff with the proceeds of cheques paid in to his account at the bank upon the day the bill became due. The plaintiff admitted that this was so, but said that it had been the invariable custom during the twenty years he had banked with the defendants' bank to treat cheques so paid in as cash. The bank denied that this was an invariable practice with them, and contended that they had the right to exercise a discretion as to whether they would treat particular cheques before clearance as cash or not. The plaintiff traded as a leather-dresser, but the bill for the dishonour of which this action was brought, was not an ordinary trade bill, but in respect of a private transaction between the plaintiff and his creditor the drawer, to whom the circumstances under which it was dishonoured were at once satisfactorily explained. There was no evidence of any special damage.

D. Seymour, Q.C., and Lankester for plaintiff.

French for defendants.

CAVE J., left it to the jury to say whether it was the course of business between the plaintiff and defendants, that cheques before clearance would be treated as cash. He also told them that in assessing the damage, they must take into consideration the fact that the bill in question was not an ordinary trade bill, so that there was not the same likelihood of injury to the plaintiff's credit.

The jury found a verdict for the plaintiff for 40*l.*, besides

10*l.* paid into court by the defendants under an alternative plea.

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Though a customer is bound by a custom of bankers (*Emmanuel v. Robartes*, 9 B. & S. 121), yet this differs from a practice of a particular bank, which would not be necessarily binding on a customer; and if the practice be not communicated to the customer, and the course of dealing between him and the Bank is such as to fail to indicate any such practice to the customer, or to lead him naturally to suppose that their course of business is inconsistent with the existence of any such practice, the plaintiffs would be estopped from relying upon it.

POLLOCK, B.

WRIGHT v. WATSON.

1883.

December 7.

THIS was an action by the trustee in bankruptcy of one Rhodes against the former solicitors of Rhodes, to recover the sum of 80*l.* which had been paid by him to them under the following circumstances:—

Where money has been deposited with a person for a specific purpose which fails, it cannot, upon the bankruptcy of the depositor, be retained as a set-off by the depositor against debts due to him from the depositor.

In an action by the trustees of one Collinge against Rhodes, an award had been made that Rhodes should purchase certain property from the trustees for the sum of 1,100*l.* 1000*l.* of this had been paid, but with respect to the remaining 1000*l.* Rhodes had deposited 80*l.* (the sum now in question) with the defendants on the terms that the defendants should retain the same until Rhodes handed them the further sum of 20*l.*, and that upon Rhodes so doing, 100*l.* should be paid by the defendants to the trustees.

While the 80*l.* still remained in the defendants' hands, Rhodes changed his solicitors; but the defendants refused to hand over the 80*l.* to the new solicitors, and before Rhodes handed over the remaining 20*l.* to anyone he became bankrupt. The vendors proved in the bankruptcy for the 100*l.*, the unpaid purchase money. Rhodes was indebted to the defendants on his general account in a sum exceeding 80*l.*,

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and in respect of this debt the defendants claimed to retain the 80*l.* deposited with him.

Forbes, Q.C., and *Ashton*, for the plaintiff, contended that the 80*l.* being handed to the defendant for a specified purpose, was impressed with a trust, and could in no event be transferred to the general account.

Wills, Q.C., and *R. O. B. Lane*, for the defendants, contended that in the events which had happened, the special purpose for which the deposit was made had failed, and the defendant was entitled to set off the amount against his debt under sec. 39 of the Bankruptcy Act, 1869.

POLLOCK, B., held that the money having been deposited for a specific purpose, the failure of that purpose did not entitle the defendants to treat the money as money payable on the general account; but that the 80*l.* still remained earmarked in the hands of the defendants for Rhodes as his *cestui que trust*, and gave judgment for the plaintiff.

Peil, Stanford, & Hine.

Watson & Dickens.

Section 38 of the Bankruptcy Act, 1863, substantially re-enacts section 39 of the Bankruptcy Act, 1869. Apart altogether from the mutual credit clause, the trustee in bankruptcy of one with whom property has been deposited for a special purpose, which has failed, is not entitled to that property as against the depositor, if, according to the terms—express or implied—under which the deposit was made, it was upon such failure to be given back to the depositor. (*Toovey v. Milne*, 2 B. & Ald. 683; *Edwards v. Glynn*, 28 L. J., Q. B., 350.) Conversely the trustee in bankruptcy of the depositor would, upon such failure, be entitled to the property from the depositary.

Whether the mutual credit clause would in such a case have the effect of entitling the depositary to retain as a set-off the amount in his hands against a debt due to him from the depositor, would seem to depend upon the question whether, by the terms upon which the deposit was made, it became, upon the failure of the specific purpose, a debt due from the depositary to the depositor.

WILLIAMS, J., and a C. J.

ROBINSON v. TUCKER.

1883.

December 6.

THIS Interpleader Issue was tried on December 6th, when, upon the finding of the jury, his Lordship reserved the question as to the way the verdict was to be entered.

Lumley Smith, Q.C., and J. V. Austin for the plaintiffs.
Channell for the defendant.

The facts and arguments fully appear from the judgment of the learned judge.

WILLIAMS, J.—This was an issue directed in a sheriff's interpleader proceeding to try the question whether certain household furniture and effects, situated in the house of the execution debtor, were the property of the plaintiffs, Messrs. Robinson & Fisher, as against the defendant, Miss Adelaide Florence Tucker, the execution creditor, when they were seized in execution by the Sheriff of Middlesex at her suit on April 9, 1883.

The issue was tried before myself and a jury, and the question now is how the verdict ought to be entered upon the evidence and upon a certain finding of the jury. The facts, which are perfectly simple, are as follows:—

John Tucker, the execution debtor, was a solicitor, and was the lessee and occupier of No. 55, Gordon Square, where he lived with his wife and family. In this house he possessed a quantity of household furniture and effects, including some valuable wine in the cellar. In February, 1882, Tucker was in pecuniary difficulties, and he applied to Messrs. Robinson & Fisher, auctioneers in Bond Street, to make him an advance of money upon security of these goods, but they declined to entertain the proposition, as it was not within their line of business. Towards the end of March, 1882, he applied to them again, informing them, as the fact was, that he had sold his lease and fitted furniture to one Trail, who was to enter at the half-quarter between Lady Day and Midsummer,

Section 8 of the Bills of Sale Act, 1878, is still in force as regards *absolute* Bills of Sale.
“Apparent possession,” in that section means, “Apparently in the possession of,” as distinguished from “Actually in the possession of,” and goods may at the same time be in the true and actual possession of one person and in the apparent possession of another.

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and he proposed to them that they should purchase the remainder of the furniture and effects out and out for a lump sum. He informed them that he was looking out for a furnished house for himself and family, and stated that if they purchased the furniture they might sell it by auction upon the premises before the half-quarter day.

This proposal was entertained by the plaintiffs, and Mr. Fisher, who acted for his firm, inspected the property, and ultimately it was agreed that they should purchase it for 1000*l.*, and on the 27th March a deed under seal was made whereby Tucker sold and assigned the goods in question to the plaintiffs for 1000*l.*, and the plaintiffs there and then paid Tucker 1000*l.* for them.

By a contemporaneous agreement in writing between the parties, the plaintiffs let the furniture and effects on hire to Tucker from week to week until determined by either party by notice in writing to expire on any Tuesday.

At the same time the plaintiffs fixed the 19th and 20th of April as the days for the sale by auction, which was assented to by Tucker; and Tucker also informed the plaintiffs that his family would leave the house before Monday, April 9th, so that they could then come in and take possession and proceed with their arrangements for the sale.

The plaintiffs did not register the bill of sale, having been advised, as it was alleged, that since the Bills of Sale Act (1878) Amendment Act, 1882, it was no longer necessary to register absolute bills of sale. So matters remained until the morning of Monday, April 9th, when Mr. Fisher went to the house in Gordon Square, taking with him one Evans, a possession man, and a clerk of the name of Ayres.

Fisher's evidence, which was fully confirmed by that of Tucker, was that he went to the house according to the appointment made with Tucker, expecting to find that the family had left, and that Tucker would be there to give him possession of the furniture; that when he entered he asked Tucker to give him possession, and to allow him to proceed to lot and catalogue the goods; that Tucker then said he was very sorry that they had not left the house as he had expected, owing to the illness of Mrs. Tucker, and that she was, in fact, then ill in bed, and he begged Fisher not to proceed that day, but to postpone the operation to a future day; Tucker added

that he did not object to the possession man remaining in possession, but he begged Fisher not to remain and disturb Mrs. Tucker that day. Fisher said he could not accede to his request, and he must be allowed to proceed; and he asked Tucker to hand him the key of the cellar. Tucker went into another room to fetch the key, and returned and handed it to Fisher, who put it in his pocket. Fisher in the meantime had begun with the assistance of the clerk to lot and catalogue the furniture. Tucker went upstairs, and shortly afterwards returned and informed Fisher that Mrs. Tucker was getting up, and that she would not stand in the way of their proceeding with their work, and accordingly Fisher and the clerk proceeded with the work of lotting and cataloguing the things. Evans, the possession man, remained in the passage. In this position of affairs the sheriff entered with the execution, and seeing Fisher and his men, said to him, "I suppose you are here on the same business that I am." Fisher told him that the property was his, except certain things that he pointed out, and so this issue was directed to be tried.

Upon the above facts and evidence the following question was left to the jury:—

Did Fisher on the 9th of April enter the house of the execution debtor with the intention of taking possession, and did he take actual possession of the furniture and effects and dispossess Tucker of them, or did he enter with the intention merely of lotting and cataloguing, and did he merely commence to lot and catalogue the things, intending to leave them still in Tucker's actual use and possession? And in answer to this the jury found that Fisher took actual possession of the things and dispossessed Tucker.

The question now is, how ought the verdict to be entered upon these facts and with this finding of the jury?

Two points arise in the case. The first is, whether the bill of sale in question, being an absolute assignment and not merely an assignment by way of security for the payment of money, requires registration under the 8th section of the Bills of Sale Act, 1878. It was contended for the plaintiffs that it did not, because that section had been repealed by the 15th section of the Bills of Sale Act (1878) Amendment Act, 1882. That section is in these words, "The 8th section of the principal Act," that is, the Act of 1878, "and also all

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other enactments inconsistent with this Act are repealed."

This section, if looked at alone, and without reference to the rest of the Act and to the scope and object of the principal Act and the Amendment Act, looks very much like a simple and absolute repeal of the 8th section of the principal Act; but upon a closer examination this appears not to be the true interpretation. The Act of 1878 embraced both classes of bills of sale, namely, absolute bills of sale, and bills of sale given by way of security for the repayment of money, both of which were by the 8th section of the Act required to be registered. The Bills of Sale Act (1878) Amendment Act, 1882, expressly excludes from its operation bills of sale given otherwise than as security for the repayment of money, as to which it is enacted that that Act shall not apply. The effect of this is, according to the judgment of Mr. Justice Fry in *Swift v. Pannell*, 24 Ch. Div. 210, to limit and confine the repealing section to the case of bills of sale given as security for the repayment of money, and for which the new Act provides a different mode of registration, and to leave absolute bills of sale still governed by the 8th section of the former statute. Acting, therefore, upon that decision, which I consider binding upon me in this Court, I hold that the 8th section of the Act of 1878 is still unrepealed so far as absolute bills of sale are concerned, and that the bill of sale in question was one that did require registration under that section.

I will only observe that this inartificial method of legislation seems to me to lay a complete trap for the honest and unwary purchaser of goods who effects his bargain and sale by means of a bill of sale. In this instance it also produces this remarkable result, that there are now two totally and entirely distinct and different modes provided for the registration of absolute bills of sale, and for bills of sale given by way of security for the repayment of money.

The second point is, whether under the circumstances of this case, the 8th section of the Act of 1878 applies to these goods at all.

It will not apply to them, unless they were at the time of the seizure by the sheriff in the possession or apparent possession of Tucker, and the only question is, what is the true meaning and interpretation of the expression "apparent

possession" in the 8th section of the Act of 1878, and how it is to be applied to the facts of the present case.

In order to determine this, it is necessary to look to the object and purpose of the enactments requiring the public registration of bills of sale.

The first of these Acts, passed in the year 1854, was entitled "An Act for Preventing Frauds upon Creditors by Secret Bills of Sale of Personal Chattels," and the preamble recites that "frauds were frequently committed upon creditors by secret bills of sale of personal chattels whereby persons were enabled to keep up the appearance of being in good circumstances and possessed of property, and the grantees of such bills of sale had the power of taking possession of the property of such person to the exclusion of the rest of their creditors;" then followed the enactments which, so far as the present question is concerned, are repeated word for word in the Act of 1878. The 8th section of this Act enacts, "Every bill of sale to which this Act applies shall be registered under this Act, otherwise such bill of sale as against all sheriff's officers seizing any chattels comprised in such bill of sale in execution of any process, &c., shall be deemed fraudulent and void so far as regards the property in, or the right to, the possession of any chattels comprised in such bill of sale, *which at or after the time of executing such process, are in the possession or apparent possession of the person making such bill of sale.*" The 4th, or interpretation clause, enacts, "Personal chattels shall be deemed to be in the 'apparent possession' of the person making or giving a bill of sale so long as they remain or are in or upon any house, &c., occupied by him, or are used and enjoyed by him in any place whatsoever, notwithstanding that formal possession may have been taken by or given to any other person." The question then comes to this, What is the true meaning of the expression, "the chattels being in the *apparent possession* of the person making the bill of sale," when read with the assistance of the interpretation clause?

This enactment has been considered several times, but I am not aware of any judicial decision which has determined the question as it now presents itself. The late Lord Chief Baron Pollock used to say that whenever a statute enacted that something should be deemed to be something which it

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might not be in truth and reality, the language required to be very strictly scrutinised, especially where it was sought by its use to invalidate a transaction honest in itself and otherwise unimpeachable. The statute says that if the goods are allowed by the grantee or purchaser to remain in the possession or apparent possession of the grantor until they are seized in execution, or the grantor becomes bankrupt, then the bill of sale shall be void unless it is registered. In my opinion the expression "in the apparent possession of" is equivalent to "apparently in the possession of," and I think that the interpretation clause does no more than declare that the mere giving or receiving formal possession shall not have the legal effect of taking the goods out of the apparent possession of the grantor where they are in a house or on premises in his occupation, or where they are in his actual use at the time. It is not the true meaning of the interpretation clause that goods shall be considered to be in the apparent possession of the grantor, in all cases where they are in a house occupied by him. If that had been the intention of the legislature, they would not have introduced the concluding words of the section; namely, "notwithstanding that formal possession may have been taken," because those words would have been wholly unnecessary. In order to give any effect to these concluding words, it is clearly necessary to treat them as limiting and qualifying the whole of the interpretation clause. It should be observed that this is merely an interpretation clause, and that it does not therefore profess to extend or alter the enacting clause, and in my opinion the enacting clause must have been interpreted exactly in the same way if no interpretation clause had been inserted, because it is not conceivable that any one could have held that the mere giving and receiving of formal possession could have had any possible bearing upon the question whether the grantor had been allowed to remain in apparent possession where the goods were in a house occupied by him.

I understand this to be consistent with the view expressed by Lord Justice Mellish, in *Lewis' Case*, 6 Ch. Ap. 626, where he says that he considers it to have been decided by the case of *Gough v. Everard* (2 H. & C. 12; 32 L. J. Ex. 210) that the mere fact of the goods remaining in the house of the grantor is not fatal to a bill of sale, if they have ceased at the

date of the bankruptcy to be in the actual or apparent possession of the grantor; and the Lord Justice cites, in support of this proposition, the language of Baron Bramwell, in which he says, "I construe this clause to mean that the goods shall be deemed to be in the 'apparent possession' of the vendor, so long as they are on the premises occupied by him, if nothing more has been done than the taking formal possession; but that where, as in the present case, far more than formal possession has been taken, the clause does not apply;" and the Lord Justice Mellish goes on to say, that what that something more must be, the judges have not defined. In *Lewis' Case*, where all that was done by the grantee was to send in a broker's man who took nominal possession of the goods, and remained on the premises, and slept in an upper storey, and allowed the grantor to remain in the full use and enjoyment of the furniture, the Lords Justices decided that this was a mere formal possession, which left the real, or at any rate the apparent, possession in the grantor. Upon careful examination, however, of *Gough v. Everard*, it will be seen that it certainly does not decide, and could not have decided, the proposition for which Lord Justice Mellish cites it, because in that case the goods were in part upon a public wharf, and in part upon a private wharf, in the occupation of the grantor, and in part in a house in his own occupation. Baron Bramwell, in that case, stated it as his opinion, in discussing the meaning of apparent possession, that there cannot be apparent possession in one person, and actual possession in another, a proposition which I own seems to me to be entirely opposed to the very language of the Act, which speaks of possession and apparent possession as possible alternatives.

In my opinion the true meaning of "apparent possession" in this statute is, "apparently in possession," as distinguished from "actually in possession," and goods may be in the true and actual possession of one, and in the apparent possession of another. Where goods are lying otherwise than in the house or premises of the vendor, possession may be given and taken without any visible change in the appearances, and if there is nothing to point to the possession being specially in the vendor, the change is complete even if nothing more than formal. But if goods are in the vendor's house, and there-

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fore *prima facie* in his possession, some actual and visible change must accompany the act of taking possession, otherwise the goods obviously remain in the apparent possession of the vendor.

Applying my own interpretation to the Act, it appears to me upon the facts of the case, and upon the view taken by the jury in answer to the question put to them, that at the time of the entry by the sheriff the goods were not in the possession or the apparent possession of the grantor of the bill of sale within the meaning of the statute. When the goods were sold it was clearly the intention of both parties to the sale that at some time before the half-quarter the goods should be sold by the grantees by public auction upon the premises, and that they should at some earlier date enter the premises and take actual possession of the goods in order to prepare them for the sale. It was agreed between them in writing that the grantor should hire the goods from week to week at two guineas a week, until that arrangement should be determined by a week's notice in writing by either side, but it was arranged, though not in a manner to be absolutely binding in law, unless notice to determine the hiring were given, that the sale by auction should take place on the 19th and 20th April, and that Tucker and his family would clear out of the house, so that Fisher could come and take possession of the goods on the 9th of April, and prepare for the sale on the 19th, and an appointment was made between Tucker and Fisher for that purpose. The hiring was never determined by a notice according to the agreement, but on Monday the 9th Fisher, according to appointment, went to the house with a clerk and a possession man for the purpose of taking possession, and expecting to find that the family had left. When he reached the house he demanded possession according to the appointment. No objection was raised by Tucker that he had not determined the hiring by notice in writing, but both parties acting in perfectly good faith with one another, Tucker expressed his regret that the family had not vacated the house because Mrs. Tucker was ill, and begged Fisher to put off his proceeding until another day, expressing his willingness to allow the possession man to remain, but begging Fisher to leave and postpone further operations. Fisher, however, refused to comply, and insisted upon proceeding, and demanded

the key of the cellar to be delivered to him, and proceeded to lot and catalogue the things. Tucker in the meantime having gone up to his wife, returned and stated that she was getting up, and withdrew his opposition to Fisher continuing. At this moment the sheriff appeared upon the scene, and, from his expression to Fisher, "I suppose you are here upon the same business that I am," at once drew the conclusion that some one other than the execution debtor was in possession. The jury found that the plaintiff had taken actual possession, and had dispossessed Tucker, and upon this verdict and upon these facts I am of opinion that the verdict upon the issue should be entered for the plaintiff.

I have been asked to finally dispose of the whole matter of the interpleader proceedings pursuant to O. LVII. r. 13. All that I can do under this order is to give judgment in favour of the plaintiff, upon this issue with costs, and to give the defendant special leave to appeal to the Court of Appeal.

Walker, Belward & Whitfield.

Owles & Collinson.

See further, as to "apparent possession," *Ex parte Jay*, L. R. 9 Ch. App. 697; *Ex parte Hooman*, L. R. 10 Eq. 63; and *Ex parte Mutton*, L. R. 14 Eq. 178.

POLLOCK, B.

JACKSON v. ASTLEY.

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December 7 & 8.

THIS was an action for damages for the breach of an agreement by the defendant, to serve the plaintiff as manager, in his pawnbroking business, and for an injunction to restrain the defendant from carrying on a similar business a few doors off.

The agreement was for a period of fourteen years, from the 29th of April, 1878, and contained covenants, providing for the due performance by the defendant of his duties as manager, but no negative covenant restraining him from carrying on

engaged in similar business a few doors off. Held, that the Court had power to grant an injunction, but that the power was discretionary, and the case was not one for its exercise.

Where in breach of an agreement by the defendant to serve the plaintiff for 14 years as manager of his business (which agreement contained no express negative covenants), the defendant left the plaintiff, and

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or managing a similar business elsewhere, during the continuance of the term.

In May, 1882, the defendant broke his agreement with the plaintiff, and left his service, and in July of that year became manager of a pawnbroking business established by his brother a few doors off.

Damages for the breach of agreement were assessed by his Lordship at £150.

On the question as to whether an injunction should go.

Lumley Smith, Q.C. (with him *Vernon Smith*) for the plaintiff, cited *Montagu v. Flockton*, L. R. 16 Eq. 129; *Lumley v. Wagner*, 1 D. M. & G. 604; Karr on Injunctions, 416; *Webster v. Dillon*, 3 Jur. N. S. 482.

Seward Brice, for the defendant, cited *Kimberley v. Jennings*; 6 Sim. 340; *Donnell v. Bennett*, L. R. 22 Ch. Div. 835; *Jacoby v. Whitmore*, 32 W. R. 18.

POLLOCK, B., held that there was power in the Court to grant an injunction in this case, but that the power was discretionary, and he should decline to exercise it here.

Venn & Woodcock.

Cooper Co.

See *Clarke v. Price*, 2 Wils. C. C. 157; *Stocker v. Brocklebank*, 3 Mac. & G. 267.

There are cases in which the Court will enforce by injunction the negative part of an agreement, where it would not have enforced the affirmative part by decreeing specific performance (see *Lumley v. Wagner*, 1 D. M. & G. 604, where the principle is stated and the authorities reviewed by Lord St. Leonards; *Donnell v. Bennett*, L. R. 22 Ch. Div. 835.) And in such cases the injunction may be granted although the negative part of the agreement is not a separate and distinct part thereof, but merely the correlative of the affirmative part (see *Catt v. Tourle*, L. R. 4 Ch. App. 654, (questioning *Hills v. Croll*, 2 Phill. 60, and *Donnell v. Bennett*, *ubi supra*).

So where there are no negative stipulations in the agreement, there is no absolute rule that they cannot be implied, and an injunction granted to restrain their breach, even though the agreement be such that specific performance of it would not be decreed, or the negative covenants to be implied are merely the correlative of the agreement in its affirmative form. "If the substance of the agreement is such that it would be violated by doing the thing sought to be prevented, then the question will arise whether this (i.e., the Court of Chancery,) is the Court to

come to for a remedy. If it is, I cannot think that (i.e., the remedy,) ought to depend on the use of a negative rather than an affirmative form of expression," per Lord Selborne, in *Wolverhampton and Walsall Railway Company v. London and North Western Railway Company*, L. R. 16 Eq. 433.

Accordingly in rare cases an injunction has been granted where there have been no express negative covenants, and the agreement would not be enforced specifically, *Webster v. Dillon*, 3 Jur., N. S. 432; *De Mattos v. Gibson*, 4 D. & J. 276; *Montagu v. Flockton*, L. R. 16 Eq. 189. But the jurisdiction of the Court to grant injunctions, whether the negative covenants be express or implied, when specific performance of the agreement in its affirmative part cannot be decreed is one very charily exercised, and one which will never be applied in ordinary cases of breach of contract (see judgment of Jessel, M. R. in *Fothergill v. Rowland*, L. R. 17 Eq. 132.)

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JACKSON
v.
ASTLEY.

CAVE, J., and a C. J.

PATON v. CARTER.

1883.

November 27.

THIS was an action for damages for the seizure and detention of certain goods, consisting of the drapery and hangings used in the exhibition of a picture. The plaintiff had entrusted one Squire with the possession of the picture and drapery for the purposes of exhibition, and Squire had hired of the defendant a room above his shop, for this purpose at 4 guineas per week rent. Eight weeks' rent being in arrear, Squire absconded, leaving the picture and drapery upon the demised premises. The picture and the goods in question were thereupon removed by one of the plaintiff's servants to his own house without the defendant's knowledge, but were afterwards brought back again on to the demised premises by the defendant's order. The plaintiff then demanded the return of the picture and drapery, &c., but the defendant returned the picture only, and retained the goods in question in respect of the rent in arrear. The evidence failed to show a tenancy between the plaintiff and defendant, but the defendant proved a tenancy between himself and Squire personally.

A landlord cannot distrain upon the goods of third persons, brought by himself on to the demised premises, without the authority of the third person, even though the goods had been originally placed on the premises by the authority of the third person and wrongfully removed by someone else.

Willis, Q. C. and *Archibald* for the plaintiff.
McCall for the defendant.

CAVE, J.—The goods having been taken off the premises

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were brought back again by the defendant. The defendant therefore seeks to distrain upon goods of third person's brought on to the demised premises by himself. Now the only right which enables a landlord to seize upon third parties' goods is that they happen to be on his premises. The power of distress in such cases is an extremely harsh one, and has never been extended to such a case as this.

The case was ultimately settled.

A. H. Holmes.

Blachford, Riches & Wood.

"I think both on principle and authority, the refusal to allow an article to leave the premises, unless the rent in arrear be paid, amounts to a distress." Per Blackburn, J., in *Cramer v. Mott*, L. R. 5 Q. B. 360, approving *Wood v. Nunn*, 5 Bing. 10.

CAVE, J.

THE MUNICIPAL FREEHOLD LAND COMPANY v.
THE METROPOLITAN AND DISTRICT RAIL-
WAYS JOINT COMMITTEE.

1883.

November 29.

A right for Directors to use a board-room for certain purposes, at certain times, and for a clerk to use a desk in an office for certain purposes, does not constitute a tenancy.

THIS was an action to recover compensation by the plaintiff company from the defendants, who in exercise of their statutory powers had taken certain premises, No. 53, King William Street, E.C., for the purposes of their undertaking, and one question raised was whether the plaintiffs were tenants from year to year, and so entitled to compensation in respect of the premises occupied by them. The premises had been demised to the Municipal Permanent Investment Building Society for a term of years: some of the directors and several of the members of the Building Society were also directors and members of the plaintiff company, but the plaintiff company was a distinct company.

By agreement between the Building Society and the plaintiffs, the latter in consideration of an annual payment of £100 to the Building Society, had the exclusive use of the board-room once or twice a week, and also the exclusive use of a desk in the outer office of the premises, and also the use of the base-

ment of the premises for their accountants jointly with the clerks of the Building Society. The work of the plaintiff company at the desk in question was transacted by one Barber, a clerk in the employment of the Building Society; and for Barber's services the plaintiffs paid the Building Society another £100 a year, but the desk was exclusively used for the business of the plaintiffs.

The registered offices of both the Building Society and the plaintiff company were No. 59, King William Street.

Charles, Q.C., and Fraser Macleod for the plaintiffs.
Matthews, Q.C., and Macrae for the defendants.

The cases of *Smith v. The Lambeth Assessment Committee*, L. R. 10 Q. B. D. 327; *The London & North Western Railway Co. v. Buckmaster*, L. R. 10 Q. B. 444; and *Hill v. Tupper*, 32 L. J. Ex. 217, were cited.

CAVE, J.—The plaintiffs have failed to prove any tenancy. Their right to use the board room was confined to particular persons for particular purposes at particular times.

As to the desk, it has not been proved that the Building Society were bound to keep Barber there, or that they might not have transferred him to some other desk or place to transact his business if they had so wished. At any rate, the plaintiffs' only right with respect to the desk, was that Barber should be allowed to do their work there. They had no right to use the desk for any other purpose, or to insist on its being used by any other person they chose to send there.

Judgment for the defendants.

C. A. Russ.

Baxters & Co.

See, too, *Hancock v. Austin*, 14 C. B. N. S. 634; 32 L. J. C. P. 252. *Taylor v. Caldwell*, 13 B. & S. 826; 32 L. J. Q. B. 164. *Reg. v. Morrish*, 32 L. J. M. C. 245.

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LITAN AND
DISTRICT RAIL-
WAYS JOINT
COMMITTEE.

CAVE, J., and a C. J.

1883.

December 7.

INGRAM v. LITTLE.

An unsigned letter, acknowledging a debt, written by a debtor's wife at his dictation, and sent to the creditor in the same envelope with a letter to the creditor, written and signed by the wife, and which referred to the unsigned letter, is not a sufficient acknowledgment of a debt by a duly authorized agent of the debtor, so as to take the case out of the Statute of Limitations.

THIS was an action for a debt admittedly barred by the Statute of Limitations, 21 Jac. I. c. 16, unless a certain letter amounted to a sufficient acknowledgment by the debtor's agent to take the case out of the statute by virtue of 19 & 20 Vict. c. 97, sec. 18. The letter relied on was written by the debtor's wife at his dictation, but was not signed at all. It was, however, sent to the creditor enclosed in the same envelope with a letter written by the debtor's wife to the creditor in her own name and signed by herself, and which referred to the letter written by her at her husband's dictation, and showed she had written it on his behalf.

McIntyre, Q.C., and *Horace Browne* for the plaintiff.

Murphy, Q.C., and *K. E. Digby* for the defendant.

CAVE, J., held that there was no sufficient signature by an agent of the debtor to take the case out of the Statute of Limitations.

Joel Emanuel & Co.

Paterson, Snow & Bloxam.

WATKIN WILLIAMS, J., and a C. J.

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December 11.

FURBER v. ABREY.

By a bill of sale, the mortgagor agreed (1) not to permit or suffer himself to be sued for any debt or

THIS was an interpleader issue to determine the right to certain goods seized by the defendant as an execution creditor and claimed by the plaintiffs under a bill of sale.

debts justly due or owing, &c., (2) On demand in writing to produce and show to the mortgagee the receipts for the rent, rates and taxes. (3) To insure the property assigned in offices in London or Westminster, to be approved by the mortgagee in default whereof it should be lawful for the mortgagee to insure and add the premiums paid by him to the security. The bill of sale empowered the mortgagee, on breach of any of the mortgagor's covenants, to seize, &c., and also contained a clause to the effect that the property should not be liable to seizure for any cause other than those specified in sect. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882. Held, that the bill of sale was not void as failing to comply with the form required by the Bills of Sale Act, 1882.

The bill of sale was in the following form :*—

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THIS INDENTURE made the sixth day of February one thousand eight hundred and eighty three BETWEEN GEORGE HASTILOW of Saint Mary Holcroft Fulham Palace Road Fulham in the County of Middlesex Commercial Clerk formerly carrying on business as a Commission Agent and Metal Merchant at 172 Fenchurch Street in the City of London hereinafter called the said mortgagor which term shall include his heirs executors administrators and assigns of the one part and WILLIAM FURBER ROBERT PRICE and HERBERT FURBER all of 2 Warwick Court Gray's Inn in the said County of Middlesex Auctioneers hereinafter called "the said mortgagees" which term shall include the survivors or survivor of them, and the executors and administrators of such survivor or their and his assigns of the other part, WITNESSETH that in consideration of the sum of one hundred pounds now paid to the said mortgagor by the said mortgagees the receipt of which the said mortgagor hereby acknowledges, HE the said mortgagor DOTH hereby assign unto the said mortgagees ALL and SINGULAR the chattels and things specifically described in the schedule hereto annexed by way of security for the payment of the sum of one hundred pounds and interest thereon, at the rate of fifteen pounds per centum per annum. And the said mortgagor DOTH hereby further agree and declare that he will duly pay the said mortgagees the principal sum aforesaid together with the interest then due, calculated at the rate aforesaid from the date of these presents immediately upon demand being made by the said mortgagees or any one or more of them or their agents or agent such demand to be made verbally to the said mortgagor or by writing addressed to him at his said address and left there or sent in a prepaid letter so addressed (the demand if by letter being deemed to be made at the time such letter would be delivered in the ordinary course of post), AND the said mortgagor doth also agree with the said mortgagee that he will not permit or suffer himself to be sued for any debt or debts justly due and owing nor permit or suffer any writ of *Elegit*, *Fieri facias*, distress for rent rates or taxes or any

* It has been thought desirable to set out in full this bill of sale, as it was one very closely criticised for the purpose of setting it aside; hence the form may be found useful.

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other proceedings of any nature to be levied or taken against the said chattels and things hereby assigned or any of them nor permit or suffer any proceedings of any nature to be taken against him under the Bankruptcy Act 1869 or any future Bankruptcy Act for the time being in force and that he will not remove the said chattels and things or any of them from the said premises where they now are or may be hereafter removed to without the said mortgagees' consent without the consent in writing of the said mortgagees or any of them first obtained and will not permit or suffer the said chattels or any part thereof to be destroyed or injured or to deteriorate subsequently to the execution of these presents in a greater degree than they would deteriorate by reasonable use and wear thereof, and will whenever any of the said chattels and things are destroyed injured or deteriorated forthwith replace repair and make good the same and will from time to time pay all rent rates and taxes payable in respect of the premises where the said chattels and things now are or may be removed to with such consent as aforesaid and will on demand in writing produce and shew to the said mortgagees or one of them the receipt or receipts for the rent rates and taxes due in respect of the premises where the said chattels and things now are for the quarter immediately preceding the date when such demand shall be made, and will insure immediately on the execution of these presents the said chattels and things for the sum of TWO HUNDRED pounds in the Phoenix Fire Office or some other responsible office in London or Westminster to be approved by the said mortgagees in the joint names of the mortgagor and the mortgagees and will produce the receipt for the premiums to the said mortgagees on demand and in default of the said mortgagor so insuring it shall be lawful for the said mortgagees to insure and add the premiums paid by them to the security hereby created. PROVIDED NEVERTHELESS that nothing herein contained shall be deemed to make it obligatory on them so to do nor shall it be deemed an alternative nor shall it make the performance of the covenant or agreement on the part of the said mortgagor not necessary for maintaining the security intended to be created by these presents AND IT IS HEREBY FURTHER AGREED AND DECLARED that in case default shall be made by the said mortgagor in payment of the said principal and

interest or any part thereof contrary to the covenant for payment thereof hereinbefore contained or any breach of any of the covenants hereinbefore contained on the part of the said mortgagor all of which covenants are hereby declared and agreed to be necessary for the maintenance of the security hereby created then and in either of such cases it shall be lawful for the said mortgagees after any such default or breach without notice either immediately or whenever they shall think fit to seize and take possession of the said chattels and things, and every and any part thereof in or at the said hereinbefore mentioned premises where the said chattels and things now are or may be with the consent of the said mortgagees and at the expiration of five days from such seizure and taking possession to sell and dispose of or to remove the same and sell the same wheresoever they shall think proper either by private contract or public auction together or in parcels for such price or prices as can reasonably be had or gotten for the same and to receive and take the moneys to arise from such sale or sales thereof and therewith in the first place to reimburse and pay themselves the said sum of one hundred pounds lent by them as aforesaid or so much thereof as shall then remain due and owing together with interest thereon from the date of these presents at the rate of fifteen pounds per centum per annum with all costs charges and expenses that may be incurred by the said mortgagees in and about the defending supporting and upholding their claim and mortgage on the said chattels and things or incident thereto and giving effect to these presents according to the true intent and meaning thereof together with the usual commission if they were selling as auctioneers of the said mortgagor and not as mortgagees and in and upon making any such sale or sales and about the receipt and recovery of the said sum of one hundred pounds and interest and in the next place if they shall think fit to pay all rent rates and taxes and incumbrances that may be due in respect of the said messuage tenement and premises where the said chattels and things shall be and which shall affect or attach to the same chattels or things and the said mortgagees may arrange with the landlord of the premises where the said chattels and things shall be for the sale thereof to be held upon the premises and may pay him any premium for such license and add the same to the principal

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moneys secured by these presents and from and after the full payment of the said sum of one hundred pounds and interest and such commission costs charges damages and expenses rents rates taxes and incumbrances and premium (if any) as aforesaid to render to and account for the surplus (if any) of the money arising from such sale unto the said mortgagor and the receipt or receipts of the said mortgagees shall be a sufficient discharge to all or every purchaser or purchasers thereof who shall not be required to see to the application thereof by the said mortgagees. AND IT IS HEREBY FURTHER DECLARED AND AGREED THAT in the event of arrangements and necessary preparations being made for sale of the said chattels and things pursuant to the powers and provisoes herein contained and the sale of the said chattels and things not taking place that the said mortgagees shall not be obliged or compelled or compellable to accept the said principal and interest or so much thereof as shall then remain due as aforesaid without being paid also all commissions valuations costs charges damages and expenses and payments of any kind which they may have been put to or incurred or sustained or be liable to have made or be entitled to with reference or in relation to these presents and the said arrangements and preparations and that it shall be lawful for the said mortgagees or any of them whenever he or they shall think fit whether default shall have been made in payment of the said loan or any part thereof or not by himself or themselves or his or their agent or agents servant or servants to enter into and upon the hereinbefore mentioned dwelling house or any other house or houses offices apartments and premises into and upon which the said chattels and things or any part thereof shall have been removed and to view and examine the state and condition thereof. AND IT IS HEREBY FURTHER AGREED that in case the proceeds of such chattels and things as shall be sold under these presents shall not be sufficient to pay and discharge the said loan and interest and said commission costs charges damages and expenses and premium hereinbefore mentioned then and in that case the said mortgagor shall and will pay so much of the said loan and interest commission costs charges damages and expenses and premium as shall remain unpaid by the said proceeds and also all other moneys as shall become due to the said mortgagees as aforesaid and that the

said mortgagor shall and will suffer a judgment by default to pass against him in an action at law for so much of the said loan and interest and other moneys and the said commission costs charges damages and expenses and premium as shall remain unpaid by such proceeds as aforesaid and also for the costs and charges of and attending on such action or suit and that in case the said mortgagees shall request permission of any person or persons who shall be in or upon any house or premises where the said chattels and things hereby assigned or any part thereof shall be to enter into or upon any such house or premises for the purpose of inspecting the same or for any other purpose and shall not upon such request be allowed and permitted to enter the same it shall be lawful for the said mortgagees forthwith thereupon to use such means as may be necessary to enter into the said house or premises in which there shall be reason to suppose the said chattels and things hereby assigned or any part thereof to be AND IT IS hereby further declared that when and as soon as all sums of money intended to be secured by these presents shall have been fully paid and satisfied whether by due payment by the said mortgagor as hereinbefore provided or by sale of the said chattels and things hereby assigned under the power herein contained or by any other means the said mortgagees will at the request and cost of the said mortgagor give him a receipt in full of all demands under or in respect of these presents and indorse a copy thereof upon this indenture but this indenture and any documents signed by the said mortgagor or any other person on the execution hereof shall remain in the custody of and be the property of the said mortgagees AND the said mortgagor doth hereby covenant promise and agree to and with the said mortgagees that he the said mortgagor is lawfully rightfully and absolutely entitled of and in and to all and singular the chattels and things hereby assigned and hath full power and authority to assign the same and all any and every part thereof as aforesaid AND THAT he the said mortgagor hath not at any time heretofore done or caused or permitted or suffered to be done any act matter or thing whereby the chattels and things hereby assigned or any part thereof have been or shall or may be charged or encumbered in any manner whatsoever and that all rents and taxes due in respect of the said dwelling house and

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premises aforesaid have been paid and discharged up to the 28th day of September last PROVIDED ALWAYS that the chattels and things hereby assigned shall not be liable to seizure or to be taken possession of by the said mortgagees for any cause other than those specified in section 7 of the Bills of Sale Act 1878 Amendment Act 1882. In witness whereof the said parties to these presents have hereunto set their hands and seals the day and year first above written.

The 100*l.* was paid as follows: two cheques for 28*l.* and 72*l.* respectively, payable to Hastilow or order, were handed to Hastilow upon the execution of the bill of sale. By arrangement between Hastilow and the grantees, the cheque for 28*l.* was endorsed by Hastilow, and handed over by him to the Imperial Discount Company in payment of a previous charge they had to that amount upon the goods. After he had cashed the cheque for 72*l.*, Hastilow, on the same day, paid a sum of 18*l.* 12*s.* to the solicitor of the grantees who had prepared the bill of sale. This sum was made up as follows:—6*l.* 6*s.* solicitor's charges for preparing the deed, 7*l.* 6*s.* valuation charges of the goods comprised in the bill of sale.

McIntyre, Q.C., and *Pollard* for the plaintiffs.

Guiry, for the defendant, contended (1) that the consideration was not truly stated; *Hamilton v. Chaine* (L. R. 7 Q. B. D. 319); *Ex parte Firth re Cowburn*, L. R. 19 Ch. D. 419; (2) that the bill of sale was void, as not being in accordance with the statutory form required by the Act of 1882, in the following respects: (a) There is a power to the grantees to add the premiums of insurance to their security. This renders it impossible to tell from the face of the document the amount of the debt secured; *Davis v. Burton* (L. R. 11 Q. B. D. 537). (β) There is a right given to seize and take possession for breach of the grantor's covenant not to permit himself to be sued for any debt, &c. This is a right of seizure not authorised by sect. 7. (γ) The covenant to produce the receipt for rent, &c., is absolute; whereas in sect. 7, sub-sect. 4, it is qualified. (δ) The covenant to insure in a London or Westminster office, and to produce the receipt for the premiums on demand, is not a provision "necessary for maintaining the security" within the meaning of sub-sect.

1 of sect. 7. (Williams, J.—I am satisfied that “necessary” does not mean absolutely necessary. It is descriptive merely.)

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McIntyre, Q.C., and *Pollard* referred to the concluding proviso of the bill of sale.

WILLIAMS, J.—In my opinion, all the objections taken to the validity of this bill of sale fail.

As to the consideration:—the lender handed the borrower two cheques; and I do not think that an arrangement that the grantor should apply one of them in payment of a previous charge, prevents the consideration from being truly stated. So, too, as to the 13*l.* 12*s.* 0*d.*, it is not as though it were shown that the money was kept back; on the contrary, he cashed the cheque, and with the proceeds paid debts he was bound to pay.

As to the objection on the ground of the right to add the premiums to the security, it is observable that the place assigned in the statutory form for the insertion of the provisions for maintaining the security is the part of the bill of sale which deals with insurance, and not the part which deals with the statement of the consideration. I do not think that the power to add the premiums to the principal sum secured, (a good and prudent thing in itself) is by implication excluded. Again, the clause providing that the grantor will not permit himself to be sued for debts, &c., means that he shall not put himself in the position of a defaulting debtor; which would have the effect of imperilling the security. I had more doubt as to the effect of the provision for the production of the receipts for rent being absolute in its form: but, in my opinion, the final proviso must be read in connection with the other covenants, and an absolute covenant must be read with the qualification imposed by that proviso. A familiar instance of this rule of construction is afforded by the case of an absolute release being treated merely as a covenant not to sue.

W. A. Price.

Western & Sons.

DENMAN, J.

FITT v. BRYANT.

1883.

December 17.

A garnishee cannot set off against a judgment creditor a debt due to him (the garnishee), from the judgment debtor, if the garnishee was aware from the commencement of the transaction, which resulted in his becoming indebted to the judgment debtor, that the judgment debtor's right to such debt, could only be as trustee for the judgment creditor.

THIS was a garnishee issue directed to ascertain whether Bryant, the garnishee, was indebted to one Venning, the judgment debtor in the sum of 55*l.* 0*s.* 8*d.*, the amount of Fitt, the judgment creditor's, debt. Fitt being entitled to a sum of over 400*l.* from an insurance company, he assigned the same to Venning by deed, in trust to pay therewith Fitt's creditors, and to pay over the balance after such payment, to Fitt. The money was accordingly received by Venning, and paid by him to Bryant, who prepared the deed, and acted as Venning's solicitor in carrying out the composition.

The composition was duly paid out of the money in Bryant's hands, and a balance of 55*l.* 0*s.* 8*d.* remained payable to Fitt, in respect of which sum he recovered his judgment against Venning. Bryant had not paid over this sum to Venning, as Venning was indebted to him on his general account in a sum exceeding this amount.

Kowalski for the plaintiff, contended that the 55*l.* 0*s.* 8*d.* was a debt due from Bryant to Venning, and that Bryant knowing it was trust money, could not retain it in respect of personal debts of Venning's. He cited *Burton v. Roberts*, 29 L. J., Ex. 484.

Edward Pollock, for the defendant, contended that Bryant was not indebted to Venning within the meaning of the issue.

DENMAN, J., held that, under the circumstances, Bryant could not set off the amount due to him from Venning personally, and that therefore there must be judgment for the defendant.

T. A. Dennison.

Oliver Bryant.

DENMAN, J.

1883.

December 17.

SHAW, SAVILL & CO., v. AITKEN, LILBURN & CO.

THIS was an action by charterers against shipowners, in which the question raised was as to whether the plaintiffs or the defendants were entitled to freight earned by the carriage of certain cabin passengers from New Zealand to England.

The terms of the charter party, as far as is material, were as follows :—

Memorandum of charter-party entered into between Messrs. Aitken, Lilburn & Co., for and on behalf of the owners of the British ship, *Loch Ryan*, 1004, A1, 1,207 tons, N.N.M., and Shaw, Savill & Co., charterers.

“The said vessel shall forthwith proceed to the Port of Wellington, in New Zealand, and be made ready and fit to receive on board a full and complete cargo of such lawful produce and merchandise as the charterers may require, and which they bind themselves to ship. In consideration whereof the said charterers agree to pay for the use or hire of the said ship the following rates of freight. The lump sum of 4,250*l*.

“Freight at port of discharge to be paid on right and true delivery of cargo in cash, ship to have a lien on all cargo for freight earned under this agreement.”

The vessel proceeded to Port Wellington, and there loaded a full and complete cargo of lawful merchandise, the cabin spaces being left unoccupied. The plaintiffs thereupon desired to utilize these spaces by carrying passengers to England; their right so to do was disputed by the shipowners, and thereupon it was agreed that the passengers should be carried for the benefit of whom it might concern; and this was done. On the part of the plaintiffs, evidence was produced to prove a custom that where a vessel was chartered for a lump sum, the charterer had the use of the whole ship, including the cabins, with the exception of the quarters for the captain, officers, and crew.

On the part of the defendants, evidence was produced to

A charterparty (not amounting to a demise of the ship), provided for the carriage of a full and complete cargo of lawful produce, and merchandize, for payment of a lump freight, but was silent as to the use to which the passengers' cabins might be put. Held that the charterers were not entitled to carry passengers in the cabins: Under the above circumstances, there is no custom (a) entitling the charterer to carry passengers or (b) entitling the shipowner to have passengers carried for his benefit.

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prove a custom that where a charter-party is silent with regard to passenger freight, the shipowner is entitled to it.

Bigham, Q.C., and W. B. Allen, for the plaintiffs.

Cohen, Q.C., and F. W. Hollams, for the defendants.

The cases of *Towse v. Henderson*, 4 Ex. 898; *Mitcheson v. Nicol*, 7 Ex. 929; *Neil v. Ridley*, 9 Ex. 680, and *Lewis v. Marshall*, 7 M. & G. 779, were referred to.

DENMAN, J.—That the plaintiffs loaded a full and complete cargo is not disputed, nor do the plaintiffs complain that the defendants have not given them a proper ship, and the proper use of ship and crew for the carriage of such a cargo. The question is, whether the plaintiffs were entitled to utilize the cabin spaces by carrying passengers therein, for their own benefit.

The attempt to prove a custom utterly failed on both sides. Nothing of the sort exists. The matter must therefore be decided on the construction of the charter-party and the authorities bearing on the point. Mr. Cohen contended that the authorities show there is no right to use the cabin spaces for cargo. Mr. Bigham, while admitting that there was no demise of the ship, contended that when the whole charter party was looked at, it amounted to an undertaking that the plaintiffs should have the use of the whole ship, and that although passengers were not cargo, yet the plaintiffs having the use of the ship, might use the ship for passengers. In support of this latter contention, reliance was placed on the statement in the charter-party as to the tonnage. This, it was said, meant that 1,207 tons measurement of ship was to be placed at the disposal of the charterers. The register brings out a balance of 1,207 tons after deducting the quarters for the officers and crew. In my opinion, however, this is pressing the words used to describe the ship too far. The words are words of mere description, and are not part of the actual bargain stipulating the amount of tonnage the plaintiffs are to have at their disposal. Reliance was also placed on the words, "use and hire of the ship." In my opinion, however, these words are used indifferently; and the meaning is that the charterer should have the use or hire of the ship for the purpose of carrying lawful produce and merchandise only, and

not passengers. The ship is at their disposal for a particular purpose only. The defendants are therefore entitled to the freight earned by the carrying of the passengers.

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SHAW, SAVILLE,
AND COMPANY

v.

AITKEN,
LILBURN,
AND COMPANY.*Ingledeu, Ince & Co.**Hollams, Son, & Coward.*

CAVE, J.

GLIDDON v. BRODERSEN, VAUGHAN & CO.

1883.

December 18.

THIS was an action by the trustee in bankruptcy of one Carvill, against the defendants, ship and insurance brokers, for breach of contract to procure a charter-party.

In July, 1881, Carvill was desirous of chartering a vessel to load and carry a cargo of timber from Shediac to England, and the defendants offered to procure for the said voyage a vessel called the *Deodata*; this offer Carvill accepted, but the defendants were unable to procure the *Deodata*. Thereupon the defendants offered to find another vessel for Carvill of about the same size, &c., as the *Deodata*, and Carvill agreed to accept and charter the same. The terms to be inserted in the charter-party, when the vessel was procured, were embodied in a document which (so far as is material) was in the following form:—

MEMORANDUM OF CHARTER-PARTY.

LIVERPOOL, 31st July, 1882.

It is this day mutually agreed between B. V. & Co., as agents for owners of the good ship or vessel to be hereinafter named, and Messrs Francis Carvill & Son, &c., &c., (here follows terms as to loading, delivery, freight, running days, demurrage, &c., usual in charter-parties).

(Signed) B. V. & Co., as Agents.

(Signed) FRANCIS CARVILL & SON.

J. McCRAITH.

The defendants failed to procure any vessel.

Gully, Q.C., and *J. G. Barnes*, for the plaintiff.

French, for the defendants, contended that there was no

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personal liability undertaken by the defendants in the transaction, and further that the agreement was *nudum pactum*, there being no consideration to support the defendant's promise.

CAVE, J. In my opinion there was a good consideration and a good contract.

Trinders & Curtis-Hayward.

F. Venn.

WATKIN WILLIAMS, J.

1883.
December 19.

FULLAGSEN v. WALFORD.

Goods were shipped from Wilmington in the United States, for Liverpool, under a charter-party which provided that freight was to be paid on the "Wilmington gross intake weight." Held, that this meant that the freight was to be paid according to the method of weighing adopted at Wilmington.

THIS was an action by shipowners against indorsees of bills of lading for 5*l.* 18*s.* 2*d.*, an alleged balance due for freight. The goods (rosin in barrels) were shipped at Wilmington, in Carolina, U. S. A., for Liverpool, under 6 bills of lading made out in similar terms, of which the following was a sample: "500 barrels of rosin, weighing 176,760 lbs., gross weight, being marked and numbered as in the margin, freight at the rate of 3 shillings 3 pence, British sterling, per barrel of 3 pounds, Wilmington gross intake weight, in cash without discount or interest at 5 per cent."

In the margin of the bill of lading were the words, "weight unknown."

The weight specified in the 6 bills of lading, added together, amounted in all to 855,490 lbs.

The weight of the goods actually delivered at Liverpool amounted to 866,251 lbs., and it was for the freight in respect of this excess that the claim in this action was made.

Evidence was adduced on the part of the defendant of a practice at Wilmington on a sale of rosin, in order to facilitate the computation of the weight, to omit the fractions over and above certain specified weights, such as 5 lbs. or 10 lbs.

Witt, for the plaintiffs.

Bigham, Q.C., for the defendant.

For the plaintiffs it was contended that the words, "Wil-

mington gross intake weight," meant the actual gross weight of the goods when they were shipped at Wilmington.

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FULLAGSEN
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WILLIAMS, J.—The words mean "According to the method of weighing pursued at Wilmington," which was the port of shipment. Now, not only has the plaintiff failed to adduce any evidence to show what that was, but the evidence adduced shows that a result might be arrived at differing from the actual weight of the goods as ascertained at Liverpool.

Judgment for the defendant.

Pritchard & Co.

Chester, Mayhew & Co.

WILLIAMS, J., and a C. J.

WHITE v. BAXTER & CO.

1883.

December 20.

In this action, the plaintiff, a London shipbroker, sought to recover a commission of $2\frac{1}{2}$ per cent. on 18,100*l.* the price of a steamer, which the defendants, shipbuilders in Sunderland, had agreed to build for Fenwick, Grose & Co., shipowners at Cardiff.

A shipbroker introducing a seller and buyer of vessels is only entitled to commission on the business resulting proximately from the introduction.

In August, 1882, the plaintiff introduced Fenwick, Grose & Co., to the defendants and negotiated a contract between them for the supply of a steamer by the defendants to Fenwick Grose & Co., the plaintiff receiving commission at the rate of $2\frac{1}{2}$ per cent. on the contract price.

In September, 1882, another contract was entered into between the defendants and Fenwick, Grose & Co., for a second steamer, upon the price of which the plaintiff was paid commission at the rate of $1\frac{1}{2}$ per cent., the contract being negotiated by himself and another shipbroker.

The contract upon which commission was now sought to be recovered, was entered into in January, 1883, between the defendants and Fenwick, Grose & Co., without the intervention of the plaintiff.

Bigham, Q.C. and Edge, for the plaintiff.

Forbes, Q.C. and G. Bruce, for the defendants.

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It was proved for the plaintiff that a custom existed in shipbroking business by which, when a broker introduces two persons and business results, he is entitled to commission on all business which flows from that introduction within a reasonable time.

At the close of the plaintiff's case His Lordship was of opinion that there was no case to go to the jury, there being no evidence that the contract was a proximate result of the introduction; but in case the Court should afterwards be of opinion that the question should have been left to the jury, he asked them to say:—

- (1.) Whether the business which was done in January was in the contemplation of the parties when they were introduced?
- (2.) Whether the business resulted proximately from the introduction?

The jury found a verdict for the plaintiff, but his Lordship entered judgment for the defendants, *non obstante veredicto*.

Ingledeu & C. Ince.

Paterson, Snow, & Bloxam.

HAWKINS, J., and a S. J.

WRIGHT v. THE HETTON DOWNS CO-OPERATIVE SOCIETY.

1883.
 July 12.

A purchaser of a horse sent it back to the seller on the ground of non-compliance with a warranty. The horse did comply with the warranty; and, whilst in the purchaser's stables, contracted a contagious disease. Of this the purchaser was unaware, when he sent back the horse. On arriving back at the seller's stables, other horses of the seller's contracted the disease from it and died. Held, that the seller could not recover damages from the purchaser for the loss of those other horses.

THE facts and arguments are fully stated in the judgment.

Waddy, Q.C., and *Joel*, for the plaintiff.

Lockwood, Q.C., and *Atherley Jones*, for the defendants.

HAWKINS, J.—This action was tried before me and a special jury, at Newcastle-on-Tyne, on the 12th July last, when, after the jury had answered certain questions put to them, it was left to me to direct how the verdict and judgment should be entered, as if the jury had found that verdict at the trial, the parties desiring to discuss the matter on further consideration

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 January 1.

in London. Apart from the question of pleading, the action was brought to recover from the defendants £75, the price of a horse sold and delivered, and also damages for returning the horse to the plaintiff's stables in a state of disease, and thereby occasioning great mortality amongst others of his horses.

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The plaintiff is a horse-dealer at Newcastle, the defendants a Co-operative Society at Hetton Downs, in the County of Durham. On the 16th of December, 1882, the plaintiff at his stables at Newcastle sold the horse in question, a black horse, to the defendants for 75*l.*, warranted a good worker, and with the condition that if it did not fulfil that warranty, the defendants should be at liberty to return it. The horse was delivered to the defendants on the same day; it was then in good health, and free from any infectious disease. The defendants kept it until the 21st of December, when, thinking it was not suitable for their work, they determined to return it to the plaintiff, and at about a quarter to four in the afternoon of that day they sent the animal from their place at Hetton to the railway station at Fence Houses, to be conveyed to Newcastle, and immediately afterwards sent, to the plaintiff at his place of business there, a telegram which arrived about 4 o'clock, to the following effect: "Look out for black horse, will leave Fence Houses about 6 o'clock, Mr. Hunting (a Veterinary Surgeon) will see you about another one."

The horse was duly boxed at Fence Houses about half-past 5 o'clock, and arrived in Newcastle about half-past 6 the same evening, and there it remained at the station until between 8 or 9 o'clock, when it was fetched by one of the plaintiff's servants, named Masters, and by him taken to the plaintiff's stables.

When the horse was led out of the railway station it appeared very poorly and could hardly walk up the street; on its arrival at the plaintiff's premises it was observed to be swollen in its legs and dull; it was then put in the stable, which was a 9-stall stable, then occupied by 6 other healthy horses, and immediately afterwards was seen there by Thomas Wright, stableman, and nephew of the plaintiff's, who observed its condition, and that it was refusing its food. He at once took it to Elphick, a veterinary surgeon, whose

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place was only a few yards off, and then having examined the horse, Elphick found it to be seriously ill, suffering from what he then thought to be a malignant form of influenza of a fatal character, known as "Pink Eye." He did not, however, that night, communicate to Thomas Wright the opinion he had formed, but directed the horse to be removed into a separate box, which was done. At 6 o'clock the next morning he called to see it again, when his opinion was confirmed, and he then communicated it to Thomas Wright. Every care was taken of the horse, but it continued to get worse, and on the 4th of January, died of "Pink Eye," having in the meantime infected several other horses of considerable value, most of which died of the same disorder. The value of these animals and the cost of endeavouring to cure them, was sought to be recovered in the present action, in addition to the price of the horse sold.

It must be taken as a fact that the plaintiff himself was absent from home during the day of the 21st December, that he did not personally see the telegram, or give directions to fetch the horse from the railway station, that when he returned late at night on the 21st, he was told the horse had been returned, but did not see it till the next morning. Nobody other than the servants I have mentioned was shown to have been left in charge of the plaintiff's business or horses.

The disease, "Pink Eye," is contagious and infectious: among the early symptoms of the approaching disease are swollen legs and disinclination to feed, accompanied by dulness.

The time within which it will declare or develop itself after contagion or infection, that is to say, the incubative stage, varies from a few hours to a few days. So again, in cases of fatal result, the period of death ranges from 24 hours to about a fortnight. After such declaration or development, one of the witnesses described it as a disease which comes on suddenly, and sometimes would fully develop in a few hours, and that development would probably be accelerated by a railway journey.

It must be taken as a fact—for the jury expressly so found—that when the horse was delivered to the defendant on the 16th of December it was not infected, but that it became so during the time it was in the defendants' possession, and

further that the symptoms I have referred to became apparent before the horse was returned, but that the defendants did not at that time know nor ought they to have known that he was suffering from "Pink Eye," or any other infectious or contagious disease. The symptoms were such as not necessarily to indicate the presence of "Pink Eye," or any serious disorder.

I now proceed to state the plaintiff's claims. First, as regards the price of the horse, the jury having expressly found that it was a good worker, there can be no doubt the defendants ought under their contract to have kept and paid for it. The plaintiff, therefore, is entitled to his verdict and judgment for 75*l.*, the agreed price, together with the sum of 7*l.* 18*s.* 0*d.*, for the keep and medical attendance upon the animal until its death, making together 82*l.* 18*s.* 0*d.*, and I direct verdict and judgment to be entered accordingly with costs.

As regards the other part of the claim, I have much more difficulty in coming to a satisfactory conclusion. Mr. Waddy, for the plaintiff, contended that the return of the horse to the plaintiff was a *tortious* act on the part of the defendants, and that being so, they are responsible for all the injurious consequences which ensued, even though they were unaware of the disease with which the animal was infected. The sending back of the horse amounted, as he urged, to a trespass upon the stable of the plaintiff in which it was placed, that the property in and possession of the horse had passed by the contract and delivery to the defendants, and that the jury having found the condition to have been fulfilled, upon the failure of which alone the right to return it depended, the defendants had no more justification or excuse for causing it to be taken back to the plaintiff's than they would have had if they had turned a strange horse, affected with the disease, into the stables, and so infected the other horses therein. If Mr. Waddy could have established this proposition, I think his view of the law as to the damages recoverable would be correct, and the cases of *Anderson v. Buckton*, 1 Str. 192; *Lee v. Riley*, 18 C. B. N. S. 722, and S. C. 84 L. J., C. P. 212; and *Ellis v. Loftus Iron Company*, L. R. 10 C. P. 10, might be cited as strong authorities in his favour. I cannot, however, adopt his view as to the tortious character of the defendants' conduct.

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In my judgment no tortious act in the nature of a trespass was established by the evidence. The horse had been sold by the plaintiff to the defendants under a conditional contract that it should be a good worker, and had been delivered into their possession under such contract and subject to the defendants' right to return it if it did not fulfil that condition. The obligation imposed on the defendants by that contract was to keep and pay for the horse if the condition were fulfilled. The finding of the jury has established the plaintiff's right to have that obligation performed, and, in not performing it, the defendants undoubtedly broke their contract.

I think for that breach alone are the defendants, under the circumstances, responsible. I confess I cannot see the evidence of any trespass. The defendants contended, though erroneously, that they had a right to return the animal, and they telegraphed to the plaintiff that they were about to send it back by rail, and invited him to look out for it.

This did not put upon the plaintiff any obligation to receive the horse back. He was at full liberty to refuse to allow it again to enter his premises.

No directions were given by the defendants to the railway servants at Newcastle to take the animal to and leave it on the plaintiff's premises. Nor, in fact, did they do so. On the contrary, the horse remained for several hours in its box at the station until it was fetched by one of the plaintiff's own men, who took it to and placed it in the plaintiff's stable, selecting the stall in which it was placed in close proximity with other horses. Mr. Waddy urged that all this was done without the authority of the plaintiff.

True, he gave no personal authority, for he was absent from home; but all this was done by and with the sanction of those who, in plaintiff's absence, were alone left to represent him and to conduct his business; and certainly in no sense can they be said to have acted in what they did as the servants or agents of the defendants: who gave them no directions, but simply addressed to the plaintiff himself the telegraphic communication above mentioned, leaving the plaintiff to act for himself according to his own discretion.

In his absence his servants opened the telegram, and, acting as they supposed for their master, fetched the horse. It may be that had he been at home he would have forbidden this, it

may be the servants acted without authority ; but that cannot make them the servants of the defendants or the defendants responsible for their unauthorised acts (if they were so).

Although I have come to the conclusion that, in sending the horse back to Newcastle in the way they did, the defendants were not guilty of any trespass or other tortious act against the plaintiff, it is nevertheless quite clear that they hoped and fully expected the plaintiff would take the horse back when he found it had arrived so far as Newcastle on its return journey. And if, in order to induce him to do this, the defendants, knowing the horse to be diseased as it then was, had by false representations as to its condition led the plaintiff to believe there was nothing the matter with it, and acting on that belief the plaintiff had taken it back and placed it in a stable with other healthy horses to whom it communicated its malady, I should without hesitation have arrived at the opinion that the defendants were responsible for the mischief they had caused by their fraud, precisely to the same extent as if it had been brought about by an unjustifiable trespass in turning the diseased horse into the stables ; under such circumstances the defendants would have been in no better position than they would have been if, by similar fraud, they had sold the horse to the plaintiff and induced him to take delivery of it. See *Mullett v. Mason* (L. R. 1 C. P. 539 : 35 L. J. C. P. 299), where the vendor of a cow fraudulently represented her to be free from infectious disease when he knew she was suffering from cattle plague, and the purchaser, believing the defendant's statements, turned her with other cows, which took from her the disease and died, and the defendant was held responsible for the whole loss which was thus occasioned. I should also have been of the same opinion if the defendants had, by warranting the horse to be in good health, induced the plaintiff to accept it back. In this case, however, there was no evidence of any representation, false or otherwise, as to the state of health of the horse, and, though the jury expressly found that it had become infected during the time it was with the defendants, and that the symptoms had become apparent before that it was returned, they also expressly found that the defendants did not know, nor ought they to have known, that the animal was suffering from "Pink Eye" or any other infectious or contagious disease. Upon these find-

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ings fraud is out of the question, and there certainly is not a particle of evidence of a warranty. I may now further observe the plaintiff's servant said that, in leading the horse from the station to his master's stables, he observed it was very poorly and could hardly walk; and another servant of the plaintiff stated that he saw it on its arrival at his master's yard before it was put into the stable, that his attention was called to it, and he noticed it was swelled in its legs and dull. Yet, with this knowledge, which was at least as much as the defendants had when they returned the animal, those servants put it, suffering as it was, into the stable with the other horses, which immediately afterwards became infected. It seems to me much more reasonable to say that the damage which resulted was directly due rather to the incautious act of putting a horse obviously ill into a stable with others, than to the mere sending him to the station at Newcastle and requesting the plaintiff to be on the look out for him. If he had been left there, or had not been incautiously put into the plaintiff's stables when its illness was observed, no harm could have arisen. See observations, &c., of Bramwell, B., in *Hill v. Ball*, 2 H. & N. 229.

I am not aware of any case which in its circumstances approaches the present, which is undoubtedly a very unfortunate one for the plaintiff; who, without any fault of his own, has sustained a serious loss. I do not, however, see any grounds upon which I can or ought to fix the defendants with the legal responsibility sought to be imposed upon them. Upon this part of the case, therefore, I direct the verdict and judgment for them. The circumstances, however, are so peculiar and exceptional that I direct each party to bear his and their own costs so far as relates to the claim I have just disposed of.

HAWKINS, J.

PYMAN v. BURT AND OTHERS.

1884.

January 14.

THE facts and arguments fully appear in the judgment.

D. Seymour, Q.C., and Edge, for the plaintiff.

G. Bruce (Lockwood, Q.C., with him), for the defendants.

HAWKINS, J.—This action came on for trial before me and a special jury at Leeds on the 8th of August last. After the case had been opened and part of the evidence taken, it was agreed that the jury should be discharged, that I should hear the rest of the evidence, draw all inferences of fact, and hear the case as though it had been set down for trial before me alone.

The action was brought to recover a sum of 39*l.* 18*s.* 8*d.*, as the balance of the amount of freight due to the plaintiffs, the owners of the ss. *Lady Clair*, for a cargo of timber sleepers conveyed from Muhlgruben, near the port of Bolderad, in the Gulf of Riga, to London, under a charter-party made in London on the 27th of April, 1881, between the plaintiffs and the defendants. The defence substantially is, that there was a short delivery, the amount of which the defendants seek to set off against the plaintiffs' claim by way of counter-claim.

By the charter-party it was agreed that the ss. *Lady Clair*, of which the plaintiffs were owners, should proceed to Bolderad and Muhlgruben, and there load from the agents of the affreighters (the defendants), as *customary*, a full and complete cargo of fir sleepers, and proceed with them to London, &c. "The cargo to be brought to and taken from alongside the ship at merchant's risk and expense (restraint of princes, &c., and all and every other the dangers and accidents of the seas, rivers, and navigation of whatever nature and kind soever, always mutually excepted). Freight to be paid in cash on unloading and right delivery of the cargo." Then follows this clause: "It is hereby mutually agreed between the parties aforesaid that, subject to the customs and regulations of the merchants

A charter-party provided that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received. The cargo (timber) was floated alongside the vessel, and receipts by the mate then given for the same: Part of the cargo was lost by perils of the sea before shipment. The loss was notified by the master to the agent of the charterer; but, at the latter's request, the master was induced to sign bills of lading for the whole quantity of timber received alongside. Held, that the charterer had no claim against the shipowner in respect of the difference between the amount of cargo received alongside, and the amount shipped on board.

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at the loading ports, and weather permitting, the cargo shall be supplied alongside as fast as the steamer can take it in ;" and there is this further provision, "The bill of lading shall be conclusive evidence against the owners of the quantity of cargo received, and in case of short delivery owners shall produce the log-book and an extended protest showing the cause of such short delivery, before freight becomes due or payable."

Under this charter-party the *Lady Clair* proceeded to Bolderad, on the river Duna, and from there to a usual and proper loading berth pointed out by the shippers at Muhlgruben, on the opposite side of the river, just at the entrance of a creek. She arrived on the 17th of May, 1881, and at four o'clock that same afternoon she was ready and commenced to take in her cargo. The method of loading was this: the sleepers, which were each about 10 feet long, were floated alongside in rafts composed of about twenty-two sleepers each; they were moored to the ship by ropes, and were surrounded by booms, so as to keep them close to the vessel, and handy for placing on board, and they were all moored between the ship and the bank. This was all in the ordinary, customary and proper course. When the rafts were brought alongside they were counted by the mate, who then took charge of and signed a receipt for the number of sleepers he had received, and from that time they were in the custody of the mate, and the shipper and his men had no more to do with them, it being the duty of the men employed by the ship to load them on board with all reasonable speed.

The number of sleepers brought alongside on the 17th of May was over 2,000. The loading commenced at four o'clock in the afternoon, and was continued with all reasonable expedition until nine o'clock in the evening, when the men engaged in loading left work for the day. A quantity of the sleepers then, without any default on the part of anybody, remained unshipped. These were left alongside, moored and secured in the ordinary way as already described, ready for shipment on the following morning when the men resumed work. At that time there was a strong current running out seawards, as is usual in the spring of the year, and a fresh wind was blowing; but there was no reason to apprehend any unusual danger to the vessel or the rafts, or to make it necessary or

reasonable to take any other than the usual means which were taken for their security and safety. There was no negligence in the mooring of the ship. About eleven o'clock at night the sheer force of the wind, which was blowing right on the starboard side on the bank, and of the very strong current, which was on the starboard bow or ahead, caused the kedge which was out on the starboard quarter to drag home, and the vessel was driven on to the bank. The effect of this was to part the booms from the ship, and to cause the rafts to break adrift, by driving them out of and under the booms, and a great many sleepers were thus lost. Immediately after the ship had been so driven on the bank, all hands were turned out, the ship was got into a place of safety, and such of the rafts as could be saved and secured were so. On the 18th the loading was continued at 6 A.M.; during that day more sleepers got adrift and lost through being washed underneath the booms by the wind and current. The same thing happened on the 19th, and on the 20th the ship left Muhlgruben. There was no want of care in securing the booms or the rafts to the vessel, or in loading; nor was there any in saving whatever could be saved, such sleepers or rafts as were lost were washed away from the booms by the action of the wind and current, without any negligence of those on board the ship; and I find, as a fact, that such sleepers as were lost were so lost by the dangers and accidents of the seas, rivers, and navigation. It is not an unfrequent occurrence for sleepers, however strongly fastened to the ship for the purpose of being loaded at Muhlgruben, to be broken away by strong winds and currents, and it seems to me that the clause as to the excepted perils in the charter-party was intended to cover such misfortunes as the loss of sleepers under the circumstances I have mentioned.

On the 19th of May, the captain made his protest at Riga, stating very shortly that the "*Lady Clair*" was then lying at Muhlgruben taking on board a cargo of sleepers, several of which had been lost from alongside in consequence of strong winds and current during the loading. On the 20th May the captain attended at the shippers' office in Riga to sign the bill of lading which had been made out in the shippers' office in accordance with the master's receipts, that is, for the whole number of sleepers which had been delivered alongside.

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Before signing the captain told the shippers' clerk that he was afraid they had lost a quantity, and asked to be allowed to note it on the bill of lading. This the shippers' clerk refused to allow, telling the captain to go and note a protest; thereupon the captain signed the bill of lading as it had been prepared. The captain never at Riga made any other protest than that above mentioned.

Pychlau, whose name appears in the bill of lading, was the vendor to the defendants of the sleepers in question. As a matter of fact, the bill of lading does not truly represent the number of sleepers shipped "*in and upon*" the "*Lady Clair*." It represents accurately however the number delivered alongside, including those which were lost before they could be put on board, and of this the captain informed the clerk before he signed. The whole of the sleepers which were actually taken on board were duly delivered in London, and the balance of freight claimed is due in respect of them, unless the defendants have established their counter-claim.

Mr. Gainsford Bruce for the defendants contended, and I think rightly, that the sleepers once delivered into the master's custody alongside in exchange for his receipts, the ship-owners are responsible under the charter-party for their due delivery, unless their loss was occasioned by one of the excepted perils—and he argued that the breaking away and loss of the deficient sleepers was not so occasioned; that no storm, tempest, or act of God had been proved, but a mere strong current accompanied by a strong wind, such as is not uncommon at that season of the year; that there must have been negligence or misconduct on the part of those in charge of the ship, either in making insufficient provision to protect the ship and her cargo against the ordinary and well-known current and wind, or in improperly and insecurely mooring her, or in improperly and insecurely placing, mooring and fastening the sleepers alongside whilst waiting to be shipped on board. Mr. Seymour objected to my considering this charge of negligence on this ground, that it was not alleged in the pleadings. I overruled this objection, because I think the question of negligence is of necessity involved in the issue, whether the loss was occasioned by one of the excepted perils; and that if it could be established that, though the loss was immediately due to the power of the

current and wind, nevertheless with proper and reasonable care the current and wind would have been inoperative to produce any damage, the loss could not be said to have occurred by such excepted perils, but ought to be attributed to the negligence of those who by due care could and ought to have protected the sleepers from harm. See *Woodley v. Mitchell*, 11 Q. B. D. 47, C. A. After careful consideration of the evidence, however, I find there was no such negligence as suggested, but that the mischief was caused solely by the action of the current and wind operating upon the ship and sleepers in the manner I have described; and that the loss was a loss by the dangers and accidents of the seas and rivers within the meaning of the clauses in the charter-party.

The defendants' next contention was based upon that clause in the charter-party which provides that "the bill of lading shall be conclusive evidence against the owners of the quantity of cargo *received*, and in case of short delivery owners shall produce the log-book, and an extended protest showing the cause of such short delivery, before freight becomes due or payable." Now the bill of lading, no doubt does on the face of it state without exception that the whole of the sleepers delivered to the master were shipped in good order, "*in and upon* the good ship called the ss. *Lady Clair*," and this bill of lading was signed and dated on the 20th of May, 1881, after the loss had occurred. Now if the bill of lading is to be considered as conclusively binding on the plaintiffs so as to estop them from saying that on the 20th May the whole of the sleepers were not on board, there would be an end of the case, and the counter-claim would be irresistibly established; for two things are certain, first, that no sleepers were lost even from alongside after the bill of lading was signed, and secondly, none which were actually stowed on board were ever lost or affected by perils of the seas.

Mr. Seymour for the plaintiff urged that the captain had no authority as against his owners to sign a bill of lading for goods not received on board, and that a bill of lading so signed cannot be made available against the owners, even in the hands of indorsees of it: citing *Grant v. Norway*, 10 C. B. 655; *M'Lean v. Fleming*, L. R. 2 H. L. C. 128. No doubt this is true as a general proposition; nor did Mr. Bruce dispute it, but he relied upon the express stipulation in the

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charter-party under the hands of the plaintiffs, the owners, that the bill of lading should be *conclusive* as against them, and I know no reason why such a stipulation should not be binding, unless the special circumstances in the case are such as to prevent it being so. I think such special circumstances do exist in this case; but before I touch upon them, I desire to point out that the clause in the charter-party now under consideration does not provide that the bill of lading shall be conclusive evidence of the quantity of cargo *shipped on board*, but only that it shall be conclusive evidence of the quantity "received;" that is to say, of the quantity for which the ship-owners are to be responsible, subject to loss by excepted perils; and full effect may be given to this clause by holding, as I do, that the bill of lading is conclusive as to the quantity received by the master, leaving it open to the plaintiffs to show that the quantity stated to have been shipped in and upon the ship is erroneous, as it clearly is. It is important constantly to bear in mind the difference between a receipt by the mate alongside and a shipment on board, because the clauses in the charter-party and the bill of lading excepting perils of the seas are in words identical—practically the risk and danger of perils by the sea to timber floating alongside waiting to be shipped, is much greater than it is to the same character of goods actually stowed on board.

A better illustration of this could not be found than in the present case, where many of the floating sleepers were washed away by the sea, whilst those on board were all safely carried to their destination.

To construe the bill of lading, taken in conjunction with the clause in the charter-party, as conclusive of the quantity shipped, would in my opinion be making "afloat" mean "on board," and imposing on the owners a liability never contemplated by either of the parties.

Assuming, however, the true construction of the documents to be that insisted upon by the defendants, the plaintiffs contended that, having regard to the special circumstances under which this bill of lading was signed, the defendants are deprived of the right to claim the benefit of that construction. In this view I agree. What are the circumstances?

On the 20th of May, after the loss had occurred, the captain went to the office of the shippers at Riga, and saw there the shipping clerk who produced the mate's receipts for the cargo and filled in the bill of lading in accordance with those receipts. He then asked the captain to sign. The captain, not disputing the correctness of the quantity received alongside, but knowing there had been a loss of some of the rafts, and that therefore the bill of lading untruly and incorrectly stated in excess the number of sleepers actually shipped, told the clerk he feared they had lost a quantity, and asked to be allowed to note the fact on the bill of lading, that is, to make the bill of lading in accordance with the truth; this the clerk refused to allow, telling him to note a protest. Upon that the captain, at the clerk's request, signed the bill of lading as it was presented to him and as it now appears. I am satisfied that it was the captain's wish and desire, as the clerk knew, that the bill of lading should state upon its face only the true quantity shipped, as distinguished from that brought alongside, and to reserve to his owners the right to excuse them only from delivering the lost sleepers upon the ground above mentioned, and had he not been prevented by the shippers' clerk from so doing, he would have noted upon it the true state of things. To hold, under these circumstances, that the owners are conclusively bound as between them and the shippers by a document signed by their captain against his wish and solely at the instigation of the shippers' own clerk would, in my opinion, be the height of injustice. See *Valieri v. Boyland*, L. R. 1 C. P. 383. It was suggested that to allow a note on the bill of lading would have been contrary to the custom at Riga; I am not of this opinion, and one of the defendants' witnesses, a Riga timber merchant, expressly stated that in his business he had always been satisfied that the captain notified on the bill of lading, the approximate number of sleepers lost as stated in his sea protest, and this is exactly what the plaintiffs' captain desired to do.

It was further suggested that the defendants could not be affected by what took place between the captain and the clerk of the shippers, Pychlau, who it was said was the mere vendor to the defendants and no agent of theirs for the purpose of shipping the cargo; I think he was. Pychlau was the shipper of the cargo at Riga, and by the very language

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BURT & OTHERS. of the charter-party, the *Lady Clair* was to load from the agents of the affreighters. Pychlau alone fulfilled that character.

One other point made by the defendants remains to be disposed of; Mr. Bruce says: Assuming it to be true that the loss was occasioned by the perils of the sea, still the plaintiffs cannot resist the counter-claim for the value of goods, or, in other words, insist upon the payment of balance of freight, because they did not, before action, produce the log-book and an extended protest (which by the charter-party is required before freight becomes due or payable) showing the cause of the short delivery. It is admitted the log-book was duly produced and also an extended protest, but it was objected that such extended protest was not made until the 3rd of June, 1881, at Hartlepool, after the arrival of the *Lady Clair* in England; whereas, according to a custom of trade at Riga, it ought to have been made at Riga before the ship left that port. The evidence given as to this supposed custom is of a most unsatisfactory character, and, moreover, was elicited from the witnesses in reply to such leading and tempting questions, that I cannot place reliance on it; I do not, therefore, consider the custom to have been proved. I think (the charter-party not expressly requiring it) it was not necessary to produce under an extended protest made at Riga, but that the extended protest made at Hartlepool after the arrival of the ship at her destination was sufficient to satisfy the requirements of the charter-party. In the result, I find that the plaintiffs have delivered all the sleepers actually shipped; that the rest were lost by perils of the sea; that the defendants have failed to establish their counter-claim, and that the plaintiffs are therefore entitled to recover the balance of freight due to them—and I accordingly direct verdict and judgment for the plaintiffs for 39*l.* 18*s.* 8*d.* with costs.

See, too, *Brown v. The Powell Coal Company*, L. R. 10 C. P. 562.

HAWKINS, J.

MITCHELL v. DARLEY MAIN COLLIERY CO.

1884.

January 14.

THE facts are fully stated in the judgment of the learned judge.

Wills, Q.C., for the plaintiff.

Forbes, Q.C., for the defendants.

HAWKINS, J.—This action was brought to recover damages for injuries done to the plaintiff's cottages by subsidence of the ground on which they stood, caused by the improper working of the defendants' colliery.

Among other defences the defendants set up the Statute of Limitations, and upon this issue among others, the case came on for trial before me at the Leeds Summer Assizes, 1883.

The case for the plaintiff, so far as the Statute of Limitations affected his right to recover, was this: that though the coal had been all got from under the plaintiff's cottages so long ago as the year 1868, no subsidence occasioning damage occurred until the year 1882. In support of this contention several witnesses were called, and among them John William Hobson, Thomas Aspin, Samuel Foster, J. Carrington, and George James Kell, to prove that subsidence causing damage had occurred so long ago as the year 1868; the defendants called two witnesses, who swore to large subsidences having taken place from 1868 to 1871, and one of them, William Batty, being one of the defendants, in order to give weight to his testimony, produced and used by way of refreshing his memory, a diary kept by himself containing entries in February and August, 1868, which, if true, as they were no doubt rightly assumed to be, irresistibly showed not only that such subsidence had occurred, but that the defendants had in August, 1868, been called upon to do and had paid for repairs necessary by reason of injury caused thereby. Upon this latter piece of evidence being given, Mr. Wills, for the plaintiff, at once, having inspected the

It is the duty of a party in an action who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule, to inform his opponent of the discovery, either by supplementary affidavit (the proper course), or at least by notice.

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diary, admitted that he could no longer contend that no damage was done by the subsidence until within six years before the commencement of this action, and admitted that the defence of the Statute of Limitations must prevail unless he could distinguish the case from *Lamb v. Walker*, L. R. 3 Q. B. D. 389.

With a view to enable him fully to consider this authority, it was arranged that the jury should be discharged, and that I should dispose of the case. On further consideration on the 18th December, the parties appeared before me further to discuss the matter, when Mr. Wills very frankly stated that he could not resist the authority of *Lamb v. Walker*, which, however, he proposed to question in the Court of Appeal.

In the meantime, until and unless that case was overruled, he admitted that I had no alternative, but to enter judgment for the defendants. I give judgment, therefore, accordingly, with costs to the defendants, except as hereinafter mentioned. Now as regards the excepted costs, the matter stands thus: under the usual order for discovery, the defendants made on the 15th February, 1883, the usual affidavit of documents. William Batty, one of the defendants whose diary had been produced at the trial, being one of the deponents. In the schedule thereto no mention was made of the diary, the fact being that at the time its existence was unknown to or forgotten by the defendants. Within two or three weeks, however, and long before the trial, it was discovered, and the legal advisers of the defendants, knowing its importance, were at first minded to inform the plaintiff of the discovery they had made. Upon consulting their London agents, however, they were told that the diary could be put in evidence at the trial without making disclosure of it, and so the plaintiff was left in ignorance of it or its contents until it was sprung upon him by surprise at the trial with the result I have mentioned. Now, in my opinion, a party, who, after filing an affidavit of documents, discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule because it has been forgotten, or overlooked, or supposed not to exist, is bound to inform his opponent of the discovery either by a supplementary affidavit, which I think is the proper course, or at least by notice; and he has no right to keep back all knowledge of the newly-discovered

document simply because he was not aware of it at the time he swore his affidavit in obedience to the order for discovery. To keep back under such circumstances a document known to be material, would, in my opinion, amount to a reprehensible want of frankness, and if, by reason of such conduct, unnecessary expense is entailed upon the party entitled to discovery, such unnecessary expense ought to be visited upon the party who ought to give it. In the present case I am satisfied the defendants and their advisers were aware of the importance and materiality of the document; that the document was one which ought to have been disclosed; that there was no justification for not disclosing it as soon as it was found; and that if it had been so disclosed, the whole of the expenses incurred by the plaintiff in his endeavour to prove that no subsidence had occurred to damage his property before the year 1882, would have been spared. I think it is unjust that he should be made to bear this expense, which has been occasioned solely by the default of the defendants or their advisers. I direct and order, therefore, that no costs shall be allowed to the defendants in respect of either of the witnesses called for the defendants at the trial; and further, that the defendants do pay to the plaintiff all costs incurred by him, in respect of those witnesses called by him at the trial, whose names I have mentioned.

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HAWKINS, J.

SINIDINO, RALLI & CO. v. KITCHEN & CO.

1883.

November 16.

THE facts and arguments sufficiently appear from the judgment of the learned judge.

Bigham, Q.C., and Manisty, for plaintiffs.

Gully, Q.C., and French, for defendants.

A contract for the sale of wheat to arrive, contained a clause that any dispute arising thereout should be referred to arbitration as therein provided.

On its arrival, the buyer claimed the right to reject it, on account of inferiority in quality. The sellers at once called for an arbitration. The arbitrators made an award that the purchaser should take the wheat with an allowance. Held, that the award was invalid, inasmuch as the only question submitted to the arbitrators was the buyers' right to reject. No custom exists in the Liverpool corn trade compelling a buyer to accept, with an allowance, wheat inferior in quality to that contracted for, if not sea-damaged.

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January 14.

HAWKINS, J.—This action came on for trial before me and a special jury at Liverpool on the 16th of November last. After all the evidence had been given it was agreed that the jury should be discharged, that the case should be heard before me on that evidence, and that I should be at liberty to draw any inferences of fact from it. I accordingly heard the case on further consideration on the 19th of December, and I have now to pronounce my judgment.

The sole question was whether the defendant was entitled to reject certain wheat he had bought of the plaintiffs, and which was not in accordance with the contract, or whether he was bound to take it with an allowance. The facts were as follows :—

The plaintiffs, on the 6th of February, 1883, at Liverpool, through Mr. Georzala, a corn broker, sold to the defendants, “agreeably with the printed rules of the Association of the Liverpool Corn Trade,” about 250 tons number one White Club Calcutta wheat of fair average quality, London standard at time and place of shipment; shipped during the month of December ^{and} or January by sailing vessel or vessels *via* the Cape, at 8s. 10½d. per 100 lbs. delivered ex quay ^{and} or store at sellers’ option, in fair merchantable condition, slight dry warmth not to be objected to. Contract not to be void unless declared vessel be lost, but any dispute arising to be settled by arbitration in the usual manner.

“Any dispute arising on this contract, or its execution, to be referred according to the 14th printed rule of the Association of the Liverpool Corn Trade.”

The wheat arrived by the *Lady Godiva* about the end of June, and was in due course tendered to the defendants, who refused to accept it on the ground that it was not in accordance with the contract; and on the 3rd of July wrote to the plaintiffs :—“Having sampled the above wheat we find same not in accordance with contract, we therefore beg to reject it.” To this letter the plaintiffs replied on the 4th of July as follows :—“We are in receipt of your memo. of yesterday, and have appointed Mr. W. E. Henson to act as our arbitrator on wheat ex *Godiva*. Meanwhile, we will thank you to take immediate steps to remove the wheat without prejudice to arbitration.” On the 10th of July the defendants, referring to the tender of the wheat, wrote to the plaintiffs,—“Please

note we appoint Mr. George Ward to act on our behalf as arbitrator on the above tender." To this plaintiffs, on the 11th of July, replied, repeating their appointment of Mr. Henson their arbitrator, and adding, "meanwhile please take delivery of the wheat without prejudice to arbitration." Upon the submission contained in the foregoing letters the parties appeared before the arbitrators on the same day, viz., 11th of July; Mr. Georzala representing the plaintiffs, and Mr. Kitchen his firm (the defendants). Samples of the wheat were produced. Mr. Kitchen enumerated the defects of which he complained, and asked the arbitrators to decide for him to *reject the wheat*. Plaintiffs, on the other hand, alleged that a very large quantity of similar quality of wheat had been delivered to other buyers, who had accepted it with an allowance; that the buyers in one case had contended they were entitled to reject the wheat, but that having appealed to the Committee of the Corn Association, that body had decided that the buyers could not reject the wheat, but must take it at an allowance; and they contended that if the arbitrators found the wheat not to be in accordance with the contract, they ought to make the defendant such an allowance as to put him on the same footing as if he had the wheat he had bought. To this the defendants said nothing. The parties then left the room; and, on the same day, the arbitrators made their award, finding that the wheat tendered was not in accordance with the contract, and awarding that an allowance of sixpence per central be made to the buyers. After leaving the arbitrators the defendant spoke to Mr. Georzala, and told him he thought if he were to take the case into a court of law he would succeed, but as he did not wish to have any unpleasantness he, being pressed by Georzala in a friendly way to take the wheat, told him to sell at 7s. 9d. per central; this Georzala tried to do, but the market was then so flat he could effect no sales.

On the 13th of July, defendants wrote to the plaintiffs stating, "Re wheat ex *Godiva*. The arbitrators having decided that the above is not in accordance with our contract, we now beg to confirm our rejection of same;" to which the plaintiffs replied, they would resell the wheat and take legal proceedings to recover the loss. This letter the defendants answered by referring the plaintiffs to their solicitors.

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The wheat was afterwards sold by the plaintiffs through Georzala, at prices much below 7s. 9d., that is between 7s. and 7s. 3d. per central, and the sale after making the allowance of 6d. per central mentioned in the award, resulted in a loss, including expenses of sale, of £348 3s. 11d., which the plaintiffs sought to recover in this action.

Upon the evidence before me I am satisfied that the wheat tendered was number one White Club Calcutta wheat, but I am also satisfied that it was not of fair average quality according to the contract, though it was in merchantable condition.

Evidence was given with a view to establish a custom in the corn trade that, provided the wheat or grain tendered under a contract is of the grade or description, or as another witness said, "classification" stipulated, no matter how inferior its quality may be (provided it is not sea-damaged), the buyer is bound to accept it, with an allowance. I am not satisfied of the existence of such a custom; and even if I were, I should very much question the reasonableness of a custom which made it obligatory upon a buyer to accept at an allowance a cargo of grain, no matter how deteriorated in quality by dirt, weevils, or other causes, provided only it answered the kind or description of corn mentioned in the contract, notwithstanding the stipulation in the contract that it should be of fair average quality. It was hardly disputed, that if the contract stood alone, the defendants would have had a right to reject the wheat by reason of the inferiority of quality. It was not a specific cargo which was sold to the defendants. No property in it had passed to them, and they never took possession of it. And certainly there was nothing in the contract itself to compel them to accept at a reduced price.

Some stress was laid on the authority given by the defendants to Georzala to sell the wheat at 7s. 9d. per central after the parties had left the arbitrators; I cannot look upon that as any acceptance or agreement to accept the disputed cargo, remembering that Georzala had pressed defendants in a friendly way to take it, and the defendants had expressed their desire to have no further unpleasantness about the matter; I look upon that conversation and authority as nothing more than a conditional assent to accept the goods at such an allowance as the arbitrators might fix, if Georzala could effect

a sale at 7s. 9d. per central, which he was unable to do, reserving to themselves all their legal rights in the event of their non-fulfilment of the conditions.

The plaintiffs evidently also took the same view, for it was upon their instructions the wheat was ultimately sold as refused by the buyers, and in their statement of claim it was not suggested that there was any acceptance by the defendants. Under these circumstances the plaintiffs are driven to rely upon the award of the arbitrators to support their claim; and they allege, first, that the original submission to arbitration justified an award that the defendants should accept subject to an allowance; and 2ndly, that be that as it may, there was evidence of a new verbal submission when the parties were before the arbitrators. I may as well dispose at once of this latter contention, by saying that in my opinion there was no evidence of such new submission; and if it could be said there was any evidence, it is insufficient to satisfy me. I find therefore, as a fact, that there was no such new submission. As to the award of the arbitrators under the original submission, the case stands thus. By the contract, any dispute arising on it or its execution was to be referred to arbitration, according to the 14th printed rule of the Association of the Liverpool Corn Trade: that rule provides that "all disputes arising out of transactions connected with the trade, shall be referred to two arbitrators, one to be chosen by each party in difference." And it further provides that "the award of any two arbitrators in writing signed by them (subject only to the right of appeal) shall be conclusive and binding upon all disputing parties both with regard to the *matter in dispute* and all expenses of the reference and award."

Two objections are made to the present award:—1st, that it does not determine the matter in dispute submitted to the arbitrators. 2ndly, that the arbitrators exceeded their jurisdiction in awarding upon matters not submitted to them, and which they were not at liberty to adjudicate upon without express agreement of the parties. As to the first, I have already said that no custom was proved to my satisfaction to exist, compelling the buyer to accept the wheat admitted not to be in accordance with the contract subject to an allowance; nor was any custom proved, nor do I find any rule of the association compelling the buyer to forego his strict legal

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1884. rights to reject, and to leave it to the arbitrators to say whether he should be at liberty to exercise that right or not under all the circumstances of the case. I find nothing to limit his right to reject if, according to the general law, the circumstances entitle him so to do.

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It seems to me that the only dispute in the present case submitted to the arbitrators was the defendants' right to reject; by the letter of 3rd July, they *did reject*, and upon that rejection, the plaintiffs on the 4th appointed their arbitrator, the defendants nominating theirs on the 10th. Upon this submission I am of opinion that all the arbitrators were called upon or entitled to do, was simply to determine the question whether the defendants had a right to reject. If they had found that issue even erroneously upon the real facts against the defendants, the latter would have been bound by the award subject to an appeal to the committee. But they have not so found; their award that the wheat tendered was not in accordance with the contract is substantially a finding that in law the defendants had a right to reject, whilst their award that an allowance of 6*d.* per central be made to the buyers, amounts to a decision that the defendants should forego their legal rights, and accept goods they were not bound to accept upon an allowance from the contract price; this, I think, they had no power to do, and therefore, I think, the award is invalid.

My judgment, therefore, after full consideration of the whole case, is for the defendants with costs.

As to the buyer's right to reject goods on the ground of inferiority in quality to those contracted for, and as to how far this right is affected by (a) the goods being specific or not, or (b) the property having, or not having, passed in them to the buyer, see *Heyworth v. Hutchison*, L. R. 2 Q. B., and the remarks of Mr. Benjamin thereon, in his book on Sales, 2nd edition, pp. 742-746.

WILLIAMS, J.

VYSE v. BROWN.

1884.

February 2.

THIS was a garnishee issue.

Morgan Howard, Q.C., and Lindon Bell, for the plaintiff.
H. D. Greene, for the defendant.

The facts and arguments fully appear from the judgment.

WILLIAMS, J.—This was an issue directed in certain garnishee proceedings to try the question whether on the 4th January, 1883, there was a sum of money which the plaintiff was entitled, under Ord. XLV. of the rules, and under the Common Law Procedure Act, 1854, to attach in the hands of the defendant to satisfy a judgment debt recovered by the plaintiff, Miss Vyse, against one Horatio Joseph James Wise.

The facts are shortly these. The plaintiff, Miss Vyse, on the 23rd of August, 1881, commenced an action against Wise for breach of promise of marriage, and recovered judgment against him on the 20th July, 1882, for the sum of £574. Previously to the commencement of this action, namely, on 11th of May, 1881, Wise, the judgment debtor, had become entitled under the will of one Thompsett to a legacy of £500. The present defendant Brown was the executor under the will. On the 31st May, 1881, and before the legacy became actually payable, Wise married.

In October, 1881, Mr. Brown passed the accounts through the Legacy Duty Office at Somerset House, and the legacy due to Wise was in hand and ready to be paid over, and thereupon upon the 17th October, 1881, Wise, by deed between himself on the one part and the defendant Brown upon the other, assigned the said sum of £500 to Brown upon trust to invest the money and pay the annual income thereof to his, Wise's, wife, to her own separate use and without power of anticipation for life and afterwards upon other trusts.

On the 4th January, 1883, the plaintiff obtained a general garnishee order attaching any sum or sums of money then in,

Where a man settles moneys by a deed fraudulent against creditors, a judgment creditor of the settlor's cannot, by garnishee proceedings, obtain payment of his debt from the trustee of the deed.

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or which might come to, the hands of the said Brown to answer the judgment recovered against Wise.

The case was tried before me on 2nd February last.

Mr. Morgan Howard, upon the above facts contended that the plaintiff was entitled to succeed because, 1st, the legacy in Brown's hands was an attachable debt, and 2ndly, that the settlement of 17th of October being post-nuptial and purely voluntary, was absolutely void as against the judgment creditor, and that she was entitled to treat the legacy for the purposes of her claim as still due from Brown to the judgment debtor.

Mr. H. D. Greene, for the defendant Brown, contended that even assuming the settlement to be impeachable, which he did not admit, yet that as it was good between the parties to it, Brown could in no sense be regarded as a debtor to Wise, and therefore there was no attachable debt. I am of opinion that the defendant's contention is the correct one. The Common Law Procedure Act, 1854, sect. 1, authorises the Court upon the application of a judgment creditor to order all debts owing from third persons to the judgment debtor to be attached to answer the judgment debt. But to entitle a judgment creditor to this form of remedy he must show that the garnishee, as he is called, is indebted to the judgment debtor in some debt, either legal or equitable, which the judgment debtor has a right to enforce against the garnishee. In the present case it seems to me that, even assuming the settlement of 17th October to be impeachable, there is nothing in the nature of a debt either legal or equitable due or accruing due from Brown, the garnishee, to Wise the judgment debtor, as between these two the settlement in any view stands good, and there is not the least ground for saying that the settlor could revoke the settlement and call upon Brown to pay over the £500 to him. It was, however, argued that the settlement must be treated as void and of no effect, and that consequently Brown stood in the position of an executor holding in hand a legacy due to the judgment debtor.

There is, however, a fallacy in this argument, for even supposing that the plaintiff had taken the proper steps to set aside the settlement as void and had succeeded in doing so, even then Brown could never have been placed in the position of being obliged to pay over the money to Wise, the settle-

ment would still be valid and subsisting between the parties; and although in such a suit Brown might be directed to pay over the whole or a sufficient part of the settled fund to the creditor, that could never be by reason of his becoming indebted to the judgment debtor; the forms of decree in such cases invariably exclude the settlor from all interest and direct that any surplus of the fund shall follow the trusts of the settlement:

I have assumed that the settlement was liable to impeachment, but I may state that no evidence was laid before me to show that the settlement was otherwise than perfectly valid.

The garnishee provisions of the C. L. P. Act are therefore wholly inapplicable to the case.

I find the issue for the defendant; and so far as I have power to dispose of the proceedings, I order that the defendant's costs of the proceedings at chambers and at the trial be borne by the plaintiff.

J. P. Godfrey.

Clarkson & Co.

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LOPES, J.

PONSFORD *v.* ABBOTT.

1884.

February 4.

THIS was an action for dilapidations. On August 22, 1861, an agreement for a lease for 21 years to commence from Michaelmas, 1861, was made between the plaintiff and a friend of the defendant. The lease was to contain a covenant to repair the premises and to leave them in repair at the expiration of the term. No lease was ever executed, and under this agreement the premises were occupied till 1869, when the defendant, with the consent of all parties, entered into occupation, saying "he would hold on under the existing agreement."

In 1872, the defendant liquidated by arrangement under the Bankruptcy Act, 1869. He got his discharge in 1880. His trustee took no steps with regard to the premises, which the defendant continued to occupy and pay rent for from 1869 till Michaelmas, 1882, when he gave up possession.

A tenant in possession of premises under an agreement for twenty-one years from Michaelmas, 1861, liquidated by arrangement in 1872, and got his discharge in 1880. The trustee took no steps with regard to the premises, which the tenant continued to occupy till Michaelmas, 1882. Held, that the tenant was bound to leave the premises in the state of repair required by the agreement.

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Petheram, Q.C., and Bremner, for the plaintiff.

H. Reed and Hammond Chambers, for the defendant, contended that the defendant was under no liability to leave the premises in the state of repair required by the agreement of August 22nd, 1861, and that for any dilapidations up to 1880, the plaintiff should have proved in the liquidation.

LOPES, J.—The defendant has occupied the premises and paid rent for them since his discharge in 1880: and the question is, What were the terms of his holding? I think the proper inference is, that he was a tenant from year to year upon the terms of the original agreement, and is therefore bound to leave the premises in the state of repair required by that agreement.

Bowker, Peake, Bird & Collins.

Louis Barnett.

LOPES, J., and a C. J.

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February 8.

MARTIN v. TRITTON AND JAMESON.

Where an Interpleader Order provided that no action should be brought against the sheriff, and the order was subsequently rescinded owing to the default of the execution creditor to return the issue. Held, that the claimant had no cause of action against the sheriff for the original seizure.

THIS was an action brought to recover damages against the defendant Tritton, the High Sheriff of Surrey, and the defendant Jameson, an execution creditor of one Albert Martin for wrongfully seizing and selling goods of the plaintiff's.

The plaintiff claimed the goods under a deed of assignment from one Hezekiah Martin, dated the 9th August, 1876, and her title to the goods was admitted by both the defendants at the trial.

The sheriff seized the goods in question in November, 1882, under a writ of *fi. fa.*, delivered to him by the defendant Jameson. A claim to the goods was thereupon made by the present plaintiff and the sheriff interpleaded. The usual interpleader order was then made on the 5th December, 1882, (to which the plaintiff was a party,) by which it was ordered that an issue should be tried in which the question should be whether the goods seized were the property of the present plaintiff as against the present defendant Jameson, the execution creditor. Further, that unless the plaintiff paid

the sum of 75*l.* into Court within 7 days from that date or gave security, the sheriff should proceed to sell the goods, and after deducting expenses, etc., pay the proceeds into Court to abide further order, and that no action should be brought against the sheriff. The issue to be prepared and delivered by the plaintiff therein within 7 days from the date of the order, and to be returned by the defendant within 5 days.

The money was not paid into Court by the claimant, and the sheriff thereupon sold the goods in question on the 27th December, 1882, and paid the proceeds, 48*l.* 8*s.* 6*d.*, after deducting expenses, &c., into Court.

The execution creditor having made default in returning the issue upon the application of the present plaintiff, at the hearing of which the sheriff was represented, an order was made at chambers on the 30th January, 1883, that unless the issue be returned before 11 A.M. the next day, the order dated the 5th of December, 1882, be rescinded, and the sum of 48*l.* 8*s.* 6*d.* be paid out to the claimant.

The issue was not returned, and the proceeds of the sale were paid out of Court to and received by the present plaintiff.

Subsequently to the directing of the issue, a conversation took place between the plaintiff and the execution creditor, at which she informed him of her claim, but he stated that he could not interfere.

English Harrison (Kemp, Q.C., with him) for the plaintiff, contended that the interpleader order, being rescinded, the cause of action against the sheriff was thereby revived, and that any protection he might have for anything done under the order, could not be extended to the seizure which was antecedent to it. As to the execution creditor, there was evidence that he had ratified the seizure.

Cock, for the sheriff, contended that the sheriff was protected for anything done by him under the order *Emmett v. Thorne*, 1 M. & S. 425. Further, that the cause of action against the sheriff, in respect of the seizure, was not revived by the rescinding order, as the latter showed upon its face that its object was in no way intended to affect the sheriff's rights.

Shortt, for the execution creditor.

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LOPES, J.—There is no case for the jury against either defendant; with respect to the execution creditor, there is no evidence of ratification, for even the conversation relied upon was subsequent to the interpleader order. As to the sheriff, he sold under the interpleader order, as he was bound to do; if he had not done so, he rendered himself liable to attachment. Is he then liable for the original seizure? I think not; although the words, “no action against the sheriff,” were not repeated in the rescinding order. It was probably thought unnecessary to repeat them, and in my view it was so.

Baker & Nairne. Abbott, Jenkins & Co., Carr & Co.

CAVE, J.

DIFIORI v. ADAMS.

1884.

February 13.

A policy of marine insurance on “pumps whilst engaged in salvage operations at the wreck of the ‘Childeric’ near Brindisi, including all risk whilst being conveyed from Brindisi to ^{and} on board wreck,” does not cover a loss of the pumps whilst being conveyed back to Brindisi on the wreck, after the salvage operations were concluded.

THIS was an action on a policy of marine insurance to recover for a total loss of certain pumps and engines.

The defence was that the pumps and engines were not at risk under the policy at the time of the loss.

The material parts of the policy were as follows:—“Upon pumps, &c., at and from the 30th of December, 1882, to the 12th of January, 1883, both inclusive, whilst engaged in salvage operations at the wreck of the *Childeric*, near Brindisi.”

... At the end of the policy were the words, “including all risk whilst being conveyed from Brindisi to ^{and} or on board wreck.”

The pumps and engines were taken to the wreck from Brindisi; when the wreck was raised, they were placed on board the wreck, and the wreck proceeded towards Brindisi, and when about three miles off, she foundered, and the pumps and engines were lost.

Witt, for the plaintiff.

Hollams, for the defendant.

Wingate v. Foster, L. R. 3 Q. B. D. 582, was cited.

CAVE, J.—The policy is peculiar: had it been a mere time policy, the plaintiff would have recovered: but there is a limi-

tation: and it is clear that the pumps were not engaged in salvage operations at the wreck at the time of the loss: "at," does not mean "on." Then do the concluding words of the policy extend the risk so as to cover this case? I think not. The word "conveyed," covers conveyance from Brindisi to the wreck, and then conveyance from the lighters on to the wreck. Had it been intended that a return voyage should be covered, the intention should have been as clearly expressed as the journey to the wreck.

Pritchard & Son.

Waltons, Bubb, & Walton.

MATHEW, J.

EDWARDS v. EDWARDS.

1884.

February 14.

THIS was an interpleader issue directed to be tried to ascertain whether the plaintiff or the defendant was entitled to the sum of 1,319*l.* 2*s.* 6*d.*, which had been paid into court by one Robert Harrington Stuart. The plaintiff was the wife of the defendant. The facts were as follows:—

On the 5th of February, 1870, a bond was given by Robert Harrington Stuart to Alexander Stuart Harrington to secure the payment of a sum of 2,250*l.* to the said Alexander Stuart Harrington, 6 months after the death of one Christian Ann Stuart therein named.

On the 4th May, 1876, Alexander Stuart Harrington, who was then married to the plaintiff, made his will by which he (*inter alia*) devised and bequeathed all his real estate, and the residue of his personal estate (after certain specific bequests) to his wife, the present plaintiff, and one William Henry Clarkson, upon trust after payment of funeral and testamentary expenses and debts, to invest the same and pay the income, &c., to his wife for life, and after her death to hold and pay the same in trust for any children of the marriage, and in default of children, to stand possessed of the trust funds and income in trust for his wife, her executors, administrators, and assigns, absolutely. The testator, further, by his said will, appointed his wife and William Henry Clarkson to be executors of his will.

A woman being executrix and residuary legatee, married in 1880. She had discharged all her duties, *qua* executrix, save that she had not obtained payment of a sum of money which fell due to her testator's estate in September, 1879, for which sum she brought an action in 1883. *Held*, that the wife's title *qua* legatee accrued before the Married Women's Property Act, 1882, came into operation, and that the husband was entitled to this money *jure mariti*.

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On the 2nd September, 1878, Alexander Stuart Harrington died, there being no issue of the marriage, and his Will was proved on the 7th November, 1878, by the plaintiff alone, power being reserved to William Henry Clarkson to come in and prove, which he did not do. On the 24th of March, 1879, Christian Ann Stuart, 6 months after the death of whom the money secured by the bond became payable, died.

In March, 1880, the plaintiff and the defendant inter-married. In July, 1888, an action was commenced by the plaintiff, suing as executrix of the Will of the late Alexander Stuart Harrington, her husband not being joined, against Robert Harrington Stuart, to recover the sum of 1,800*l.* 19*s.* 2*d.*, then remaining due from him upon the bond. A claim was thereupon made by the present defendant against Robert Harrington Stuart, claiming to be entitled absolutely in his marital right to this sum of 1,800*l.* 19*s.* 2*d.*

Thereupon, upon the application of Robert Stuart Harrington, an interpleader order was made on the 19th July, 1888, directing this issue to be tried. No settlement had been made upon the wife on this marriage, nor was any question raised in this issue as to her equity to a settlement.

The plaintiff and defendant were living apart, and had been so from July, 1882.

A creditor of the late Alexander Stuart Harrington was called as a witness for the plaintiff, and stated that a sum of 29*l.* was due to him for cigars supplied during the years 1869 to 1874, which, notwithstanding application, had not been paid.

The defendant was called, and stated that his wife had several times told him that all the testator's debts had been paid.

English Harrison, for the husband.

The question is whether the husband or the wife is entitled to receive this money. In the events which have happened, she became entitled under the will to this money absolutely, and it is clear, apart from the Married Women's Property Act, 1882, that the husband, *jure mariti*, would have been entitled to the money, subject to the wife's equity to a settlement. *Thrustout v. Levin*, 2 Wm. Blk. 800, shows that where the wife is executrix, the husband is entitled even to release a

debt if he wishes. The wife's title to this money having accrued due before the Act, Sect. 5 has no application. Sect. 18 is merely an enabling section to get rid of the necessity of joining the husband for the sake of conformity.

Pollard, for the wife.

The wife's claim to this money is as executrix, and it is not shown that her title as legatee accrued before the Act of 1882 came into operation; if it did not accrue till after that Act, Sect. 5 makes it her separate property. The dual capacity exists here of executrix and legatee, and there is nothing to show that she has assented to hold this money for and on behalf of herself, *qua* legatee.

MATHEW, J.—Although the wife sued as executrix, I have no doubt that the issue intended was whether the wife was entitled to this money, as against her husband. The evidence satisfies me that the wife had discharged, and considered herself as having discharged her duties as executrix long ago, and no question as to her equity to a settlement is raised in the case. Under these circumstances the husband's marital rights, as they existed prior to the Act, must prevail.

J. B. Hocombe.

Sole, Turner, & Knight.

MATHEW, J.

BROWN v. INSKIP.

THIS was an action for a mandatory injunction to compel the defendant to pull down certain buildings.

Fischer, Q.C., and E. W. Byrne, for the plaintiffs.

Charles, Q.C., and Smart, for the defendant.

The facts and arguments appear from the judgment.

February 25. MATHEW, J.—This was an action to restrain the defendant from building upon a yard which formed portion of a dwelling

Held, that the successor in title of the purchaser of one of such plots was entitled to enforce such restrictive covenants against the successor in title of an earlier purchaser of an adjacent plot.

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1884.

February 18.

An estate was sold in plots for building purposes, according to a scheme. The conveyances contained restrictive covenants as to the buildings to be erected, entered into by the several purchasers with the vendors, their heirs and assigns:

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house, No. 19, Esplanade, Scarborough, in violation of the covenants contained in the conveyance of the premises to the defendant's predecessor in title. By an indenture of feoffment of the 5th September, 1842, certain freehold land was conveyed by the Corporation of Scarborough to Williamson & Bottomley for building purposes in accordance with a scheme and plan described in the deed.

Williamson & Bottomley were trustees for a body known as the "South Cliff Proprietors."

A further and more precise plan of the estate was afterwards prepared in 1844, and the estate was subsequently built upon in substantial accordance with the plan. Part of the estate was laid out as a garden and pleasure grounds, and it was arranged that a contribution should be annually made by each purchaser of a plot for maintaining the estate, and such payments have been made down to the present time. By a conveyance of the 22nd August, 1844, the South Cliff Proprietors conveyed in fee to one Blenkin the plot of land upon which the defendant's house was built, subject to the observance of the stipulations in the deed of 1842, so far as the same was applicable; and the said Blenkin entered into covenants with the vendors and their assigns intended to secure uniformity and regularity of structure in accordance with the plan, and in particular into the following covenant as to the yard:—

"The said Thomas Blenkin doth hereby for himself, his appointees, heirs, executors, administrators, and assigns, covenant, promise, and agree to and with the said parties hereto of the first and second parts (the South Cliff Proprietors) and with each and every of them, and with the heirs and assigns of each and every of them, that he, they, or any of them will not (*inter alia*) at any time hereafter build, erect, or place any building or erection whatsoever in or upon any part of the said yard exceeding the height of 12 feet measured from the then present level without the consent in writing of the said several parties hereto of the first and second parts, their heirs or assigns."

There was evidence which satisfied me that the other plots of land upon which private residences were erected on the esplanade were conveyed to different persons, subject to covenants of a similar kind, and which were intended to

carry out the building scheme embodied in the plan of 1844. The defendant is now the assignee and owner in fee of the plot of land, dwelling house, and premises comprised in the last mentioned indenture, and which were conveyed to him subject to the observance of the stipulations in the deeds of 1842 and 1844 so far as they were applicable. By an indenture dated the 23rd May, 1846, the South Cliff Proprietors conveyed to one Wilson in fee another plot, part of the land comprised in the deed of 1842, on which the house now occupied by the plaintiff was built, known as No. 1, Albion Road; and in this conveyance Wilson entered into restrictive covenants similar in character to those contained in the conveyance to Blenkin.

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In 1881 the plaintiff Hobson purchased the house and premises No. 1, Albion Road. The plaintiff Brown is now the surviving trustee of the estate of the South Cliff Proprietors. The plaintiff's house stands in the rear of the defendant's at the other side of a road which is 27 feet wide. In 1882 the defendant commenced to build on the yard at the back of his house, and it was admitted that he did so in violation of the covenants contained in the conveyance to him and his predecessors in title.

The evidence satisfied me that the building in question would be a substantial injury to the plaintiff's house. It interfered with the sea view from the plaintiff's windows, hindered the free circulation of air, and altered the character of the plaintiff's house in a manner calculated to depreciate the value of the plaintiff's property.

It was, however, contended for the defendant that neither the plaintiff Hobson nor Brown, who was made co-plaintiff as quasi-trustee for Hobson, could maintain any action against the defendant.

The defendant's counsel mainly relied on the authority of *Renals v. Cowlishaw*, 9 Ch. D. 125, 11 Ch. D. 866, and contended that the covenants in the defendant's conveyance were not shown to have been entered into for the benefit of the plaintiff's property.

But the evidence satisfied me that the covenants by which the defendant was bound, were entered into for the benefit of the neighbouring property, including the plaintiff's, the value of which would be affected by the breach of those covenants.

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The original purchaser, Blenkin, would know that those covenants were intended to enhance the value of the vendors' estate, and each subsequent purchaser, as Blenkin must have foreseen, would be made aware as a matter of course of the fact that Blenkin had entered into those covenants, and would by reason of this information be induced to purchase and to consent to enter into covenants for the same purpose, viz., to maintain and carry out the building scheme for which the property had been acquired. The case seems to me to be clearly brought within the principle of the decisions in *Tulk v. Mozhay*, 2 Phil. 774; *Western v. Macdermott*, L. R. 2 Ch. 72; *Eastwood v. Lewis*, 4 De G. J. & S. The rules of law where there is, and where there is not a common scheme for building are illustrated by the case of *Renals v. Cowlishaw*, and the following passage in the judgment of V.-C. Hall, 9 Ch. D. p. 129, seems distinctly applicable to this case. "A purchaser may also be entitled to the benefit of a restrictive covenant entered into with his vendors, by another or others when his vendors have contracted with him, that he shall be the assignee of it, that is, shall have the benefit of it, and such contract need not be express, but may be collected from the transaction of sale and purchase."

That there is such a contract here, and that the plaintiff Hobson is entitled in equity to the benefit of it against the defendant is in my judgment clearly made out.

But then it was argued by the counsel for the defendant that, assuming this covenant to have been originally binding, there had been such an abandonment of the original scheme as brought the case within the authority of *the Duke of Bedford v. the Trustees of the British Museum*, 2 Myl. & R. 532, and that the defendant was relieved in this way from the obligation of covenants entered into in furtherance of the scheme with the vendors or their assigns. But the evidence did not satisfy me that there had been any abandonment of the original scheme. Further, the acts relied upon by the defendant's counsel, if sufficient to show that the scheme had been departed from elsewhere, did not affect either the plaintiff's or the defendant's property. There was no evidence that either the plaintiff or his predecessors in title had acquiesced in any departure from the common scheme, and even if there were evidence of acquiescence by the vendors in

the erection of injurious buildings elsewhere upon the estate, it seems difficult to see why the plaintiff Hobson, or Brown as his trustee, should be disabled, by the acts of others that did no harm to the property in question, from complaining of what the defendant proposed to do, and which was a direct injury to the plaintiff's premises. A further point was made for the defendant, viz. : that the plaintiff's house had not been erected in the exact spot marked on the plan as the site of No. 1, Albion Road. And it was proved that the house had been built some 50 feet nearer the house of the defendant. But it seems to me that this fact cannot avail the defendant. The reasonable inference would seem to be, regard being had to the time which has elapsed since both houses were built, that this deviation from the plan had been assented to by all parties.

It is a significant fact that the covenants had been mutually observed for more than 80 years by the predecessors in title of plaintiffs and defendant, and that no complaint had been made about the position of the plaintiff's house. A further point was made that the plaintiff had not prosecuted his trial with sufficient diligence. But the evidence satisfied me that there had been no unreasonable delay.

The defendant undertook in the course of the suit to abide by any order made at the trial for pulling down the new building. I direct that the defendant shall fulfil this undertaking.

Injunction as prayed in claim, with costs.

No inquiry as to damages.

Torr, Janeways, Gribble & Oddie.

Iliffe, Russell, Iliffe & Cardale.

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DAY, J.

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REGINA v. GREENWICH BOARD OF WORKS.

February 18.

A district board of works has no power under the Metropolis Management Amendment Act, 1862, if it approve of the plans and sections of sewers proposed to be constructed by a private landowner and branched into the main system, to withhold their sanction in writing to the construction of the same until such private landowners shall pay a sum of money to the Board to cover the expenses of the Board in supervising such works.

THIS was an action of mandamus to compel the defendant Board to give their sanction to the construction of certain works in accordance with certain plans and sections, under the following circumstances :—

One Todd, a landowner possessed of land situate within the metropolitan area, was desirous of carrying a drain through his land, and running a branch sewer from the drain into the main district sewer, which was vested in the defendant Board.

By sect. 44 of the Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), it is provided : " It shall be lawful for the owners or occupiers of any land or premises in any parish, district or part within the limits of the metropolis as defined by the firstly-recited Act, with the consent and subject to the regulations and conditions hereinafter mentioned, to construct sewers at their own expense for the purpose of draining such land or premises."

Sect. 47. " Every person other than a vestry or district board intending to make or branch a sewer either into a sewer vested in the Metropolitan Board of Works or into a sewer vested in any vestry or district board, shall in the first instance lay the plan and section thereof before and apply for the sanction of the vestry or district board of the parish, district or part in which such last-mentioned sewers shall be situate ; and no sewer shall be begun to be made by such person until the sanction in writing of such vestry or district board shall have been obtained."

Sect. 48. " Before any vestry or district board shall sanction the construction of any such sewers they shall submit the plan and section thereof to the Metropolitan Board of Works for their approval, in the same manner as if such sewers were proposed to be constructed by such vestry or district board ; and no vestry or district board shall sanction the construction of any such sewer without the approval in writing of the said Metropolitan Board first had and obtained."

Sect. 61. "No person shall make or branch any sewer or drain or make any opening into any sewer vested in the Metropolitan Board of Works or in any vestry or district board without the previous consent in writing of such board or vestry; provided that it shall be lawful for any person with such consent at his own expense to make or branch any drain into any sewer vested in such board or vestry, or authorized to be made by them or either of them under the firstly-recited Act or this Act, such drain being of such size, materials, and other conditions, and branched into such sewer in such manner and form of communication in all respects as the board or vestry shall direct or appoint."

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The plans and sections of the works proposed to be made by the applicant had been duly laid before the defendant Board, in whom the sewer, into which the drainage works were to be branched, was vested: the plans, etc. had been approved by the Metropolitan Board, and also by the District Board. The latter, however, insisted on having the construction of the works superintended by surveyors of their own, and claimed the right to charge the expense and cost of such superintendence on the landowner; and in pursuance of this contention, refused to give their sanction in writing to the construction of the works except on condition that the landowner paid the sum of £35 towards such costs, and entered into an agreement to pay whatever other sums might be so expended.

Charles, Q.C., and *Cock* contended on behalf of the applicant that this action on the part of the Board was an attempt to obtain the £35, and the future sums expended by them in supervising the works by a side wind, which the Act did not authorize: and that having approved the plans and sections, and obtained the sanction of the Metropolitan Board of Works, their action was *ultra vires*.

Jelf, Q.C., and *Dickens* for the Board contended that they had only sanctioned the plans, not the construction of the works, and that they were entitled to see that the works should be carried out without detriment to the main sewer, and to impose reasonable conditions to insure this being done.

DAY, J., after stating that from the resolution of the Board approving the plans it was manifest that there was no

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objection on their part to the propriety of the works, continued : The question is, whether the condition imposed by the Board, requiring payment of the £35, and the entering into the proposed agreement to pay such further sums as might be expended in the supervision of the works, is a proper condition. I recognise the great importance for the benefit of the public of seeing that these works are properly done. We know, on the other hand, that when they are done, the public derive great benefit from them. The question whether any proposed works are proper and should be permitted is within their discretion. If their discretion is duly exercised there is no appeal. The whole question in this case is whether this condition was within their competency. If they are entitled to impose such a condition their decision is not open to review.

It is said that the Board have to give a sanction in writing to the construction of the works, and that this sanction differs from the consent and sanction which they and the Metropolitan Board gave to the plans. The Metropolitan Board are responsible for the whole system of drainage, and they must see the plans to approve them ; on the other hand, if they approve the plans, there may be local reasons for the Local Board to disapprove the plans : and if their reasons for disapproving are within their power, there is an end of the question : it is for them to see whether the plans are adapted to the locality. In this case they do not say they disapprove of the plans : what they say is they will make it a term of giving their consent that £35 should be paid for the employment of an officer to supervise the works. In my opinion they have no power under the Act to impose such a term ; there is nothing in the Act enabling them to make such a condition. They ought to inspect the works in the interest of the public, and they ought to pay for such inspection. I think the condition they have imposed and the withholding their consent because it is not complied with, is unlawful, and that the applicant is entitled to our judgment.

Greaves & Co.

Watson, Sons, & Room.

POLLOCK, B.

JETLEY v. HILL.

1884.

February 19.

THE plaintiff, an upholsterer, sued for the price of furniture supplied to the defendant in 1881-82, and papering and painting executed at the defendant's house during the same period on the order of his wife. The defendant denied that his wife had any authority to pledge his credit for the same, and also said that credit was given to the wife exclusively. At the time the order was given and the goods supplied the defendant and his wife were living together. The defendant called several times at the plaintiff's shop while the order was being carried out, sometimes with his wife, sometimes alone, he assisted her in selecting some of the articles purchased, and when he called alone he made inquiries as to the goods and gave some directions as to when they were to be sent home. On one occasion he directed an alteration in the pattern of one of the articles supplied. The wife had a separate income nearly as large as the husband's, and he had prohibited her from pledging his credit. No notice of the prohibition was given the plaintiff; and by private arrangement between husband and wife she had agreed to pay for the goods.

Where a husband and wife were living together, and furniture was supplied for, and work done at, the house, on the order of the wife, but the husband took part in making selections and giving directions as to the execution of the orders: *Held*, that the husband was liable to pay for the goods and work although he had expressly prohibited her from pledging his credit, and they had agreed together that she should pay for the goods and work.

The defendant's wife ceased to live with him in July, 1882. She took most of the articles in question with her when she left.

Kemp, Q.C., and *Rose Innes*, for the plaintiff.

Cock, and *C. G. Ellis*, for the defendant, contended on the authority of *Jolly v. Rees*, 15 C. B. N. S. 628; *Debenham v. Mellon*, L. R. 6 App. Cas. 24, that the defendant was not liable.

POLLOCK, B.—The implied authority or mandate by a husband to his wife has been considerably curtailed by recent decisions. *Debenham v. Mellon* is an authority for this proposition: that there is strong evidence to go to a jury if a wife gives orders, while husband and wife are living together

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in the ordinary way, even for goods which are necessities personal to herself, that she does so as agent for her husband. The facts in *Debenham v. Mellon* were different from those in ordinary cases ; there was no household establishment there, no living on credit in the ordinary way. The defendant and his wife were managers of a hotel at Bradford, and credit was given to the wife by a tradesman living in London.

Care must no doubt be taken not to extend in any way the implied authority given by a husband to his wife. But here we have the case of a husband and his wife living together ; and there is considerable evidence before me that the husband took an active part, if not in giving the orders, yet in expressing his view as to how the orders should be carried out. The goods were ordered for, and were known by him to be ordered for, rooms in which he was living with his wife. Although it be admitted that he prohibited her from pledging his credit, yet, considering the nature of the goods, and considering that they were ordered and supplied for rooms which they occupied together, I must treat the case as different from those that have been cited to me.

The matter does not rest there, for there is the personal interest and concern shown in the transaction by the husband whatever may have been the private arrangement between himself and his wife. Yet, by adhering to her orders and using the goods when they came home, he allowed her to hold herself out as his agent, and he has therefore rendered himself liable.

Verdict for the plaintiff.

Lumley & Lumley.

Fearon & Griffenhoof.

STEPHEN, J.

BRYDEN v. NIEBUHR.

1884.

February 20.

THIS was an action by shipowners against charterers for demurrage. The charter-party, after providing that the steamer was to load a cargo of rice at Rangoon, proceeded, "and being so loaded shall therewith proceed to Malta, *via* Suez Canal, under steam all the way (unless disabled) for orders, which are to be given from London within 24 hours after receipt of notice, or lay days to count." The charter-party also contained the following clause: twelve working lay days (Sundays excepted) are to be allowed the said merchants for loading the said ship at the port of loading, and waiting for orders there, after loading, and waiting for orders at Malta and Falmouth, to commence and be computed 24 hours from the period after vessel being cleared and ready for that purpose, and after the master has given written notice to that effect to the charterers' agents.

The charter-party also contained the following clause:—"Charterers' responsibility to cease on vessel being loaded, provided the cargo is worth the freight. Captain and owners having an absolute lien on the cargo for all freight, dead freight, demurrage, and all other charges, which lien they shall be bound to exercise."

The 12 lay days were exhausted at Rangoon, and at Malta orders were not given within 24 hours after receipt of notice, and the vessel was detained there 4 days. The charterers' agents at Rangoon forwarded the bill of lading for the cargo to the defendants in London, and the defendants were the indorsees and holders thereof. The bill of lading contained the words, "he or they paying freight and performing all other conditions, as and in the said charter-party."

The demurrage was claimed in respect of the 4 days' demurrage over and above the 12 days allowed by the charter-party.

A charterparty provided that the vessel should proceed to Malta for orders, which were to be given from London within 24 hours after receipt of notice or lay days to count: *Held*, the orders not having been given within the time prescribed, that the lay days did not begin to count till the expiration of the 24 hours.

A clause in a charterparty providing for the ceasing of the charterer's responsibility on the goods being loaded, does not absolve the charterer, if he be also the indorsee and holder of a bill of lading incorporating the conditions of the charterparty, from liability for damage incurred at an intermediate port.

Meadows White, Q.C., and Moulton, for the plaintiff.

Finlay, Q.C., and T. T. Buckwill, for the defendants, con-

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tended that having regard to the cesser of liability clause in the charter-party, the defendants were not liable for demurrage as charterers: nor were they liable, as holders of the bills of lading, inasmuch as the claim was not in respect of demurrage at the port of discharge. The case was therefore distinguished from *Gullichsen v. Stewart*, L. R. 11 Q. B. D. 186. At any rate only 3 days' demurrage are recoverable, for the lay days at Malta would not begin to run till the expiration of the 24 hours.

STEPHEN, J. On the last point I decide with some hesitation in favour of the defendants, as I think the construction that makes the lay days begin to count from the expiration of the 24 hours, most consistent with common sense. But on the main point, I have no doubt that the defendants, as indorsees and holders of the bill of lading, are liable for demurrage.

Keene, Marsland, & Bryden.

Botterell & Roche.

WILLIAMS, J.

WHEELER v. THE UNITED TELEPHONE
COMPANY.

1884.

January 26.

Payment of money into Court by a defendant coupled with a defence denying liability in the action, but alleging that if the liability is proved the sum paid in is sufficient to satisfy the plaintiff's claim, is not a payment into Court by way of satisfaction or amends. Therefore, if the defendant's liability is established at the trial the plaintiff is entitled to judgment in the action even though the sum paid in is found to be sufficient to satisfy the plaintiff's claim.

JUDGMENT in this action was given by me for the plaintiff on the 26th January last.

I was aware, as I stated at the time, that the same or a very similar case had been before myself at chambers, viz., *Goutard v. Carr*, which had been taken upon appeal to the Divisional Court and ultimately to the Court of Appeal; but I was unable after making every inquiry that I possibly could make to ascertain what had been the result, beyond a vague rumour that the decision had in some way or under some circumstances been either varied or reversed either in the Divisional Court or the Court of Appeal, but more I could not learn.

Since giving judgment, however, I find that the case has since been reported in the *Weekly Reporter*. There

is, however, no report of the opinions of the Lords Justices upon the main question, and I can only find from the report that for some reasons or other not stated, the Lords Justices reversed the decision of the Divisional Court which had affirmed the decision at chambers, but an appeal being now a rehearing of the case, it is now impossible to know from the mere result without more, whether the Court of Appeal has really differed from or agreed with the original decision of the Court below.

As therefore, I gave my judgment in the present case in apparent opposition to the decision of the Court of Appeal as it is reported, I think it is only respectful to that Court that I should reduce my judgment with the reasons for it carefully into writing.

Judgment.

This action was brought to recover damages for trespass in breaking and entering the plaintiff's land and erecting telegraph poles therein. The defendants by their statement of defence, first disputed the plaintiff's possession of the land. 2ndly. They justified under a lease and license, from one having title paramount, and thirdly, they pleaded that without admitting any kind of liability they brought into Court the sum of £5, and said that it was sufficient to satisfy any damage that the plaintiff might have sustained in consequence of any acts of their. The plaintiff joined issue upon these defences. At the trial, the plaintiff established his title to the land, the defendants failed to prove their justification, and upon the issue as to the sufficiency of amount paid into court the plaintiff failed to prove any damages *ultra*.

The verdict was accordingly found and entered for the plaintiff upon the issues raised by the 1st and 2nd defences, and for the defendants upon the question as to the sufficiency of the amount paid into court. Upon these findings, judgment in the action was entered by me in the plaintiff's favour, for £5 damages and costs, and for the defendants for their cost of the issue as to quantum of damages.

For the defendants it was contended that they were entitled to the judgment in the action as having succeeded upon a defence going to the whole cause of action, and several cases were cited which were said to be decisive of the question in

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the defendants' favour. None of the cases cited appeared to me, however, to be decisions upon the point at all, although they contain here and there, *dicta* of individual judges, favourable to the defendants' contention. I think it is desirable, therefore, that I should state the precise grounds upon which I have arrived at the above conclusion.

In the first place, it seems to me that great misapprehension has arisen with respect to the right and the effect of paying money into court by way of satisfaction and amends, and this has arisen from want of attention to the history of this method of meeting the plaintiff's complaint, and from the fallacy of supposing that a payment of money into court, is or ever was a real defence to the action. In my judgment it is incorrect both historically and in substance to speak of a payment into court as constituting a defence to an action. It is permitted by law to be pleaded as a bar to the further maintenance of the action, and must amount in substance and in effect when so pleaded to an unequivocal plea in confession, with a tender of compensation and amends, and when so pleaded the plaintiff is put to his election either to accept the sum so tendered in satisfaction, and have judgment for his costs, or to deny the sufficiency of the amount, in which case, if he fails to recover a larger sum, the defendant becomes entitled to the verdict and judgment in the action.

No law from the earliest times to the present has ever authorized the courts to treat as a complete defence either to the action itself, or even to its further maintenance an equivocal payment of money into court in satisfaction, coupled with the condition that the defendants' liability shall be established.

The practice of paying money into court by way of satisfaction is about 200 years old. It was introduced in order to avoid the risk of a plea of tender, and was at first applied only to actions of debt.

It frequently happened that the plea of tender, which was necessarily accompanied by a payment of the money into court, failed because the defendant failed to prove an unconditional tender, and the practice accordingly sprang up in such cases of allowing the defendant who brought the money into court to make an offer of the amount to the plaintiff not by way of defence to the action, but by way of confession and satisfaction, with a submission to pay the plaintiff's costs up to that time.

This was not done by way of plea, nor was the proceeding in any way entered upon the record. It was carried out by a rule of Court embodying the terms upon which the defendant offered to confess the action, and make satisfaction and making provision for further contingencies. The practical effect was that if the plaintiff at any time before taking the cause down for trial signified his willingness to accept the money offered in full satisfaction of his claims he was allowed to take it and tax his costs up to the time of the payment into Court, but if he took the cause down to trial and did not succeed in establishing a claim exceeding the amount offered by the defendant, he was deprived of the whole costs of the action, and the defendant had the whole costs of his defence. This result was brought about by the special terms of the rule.

This practice, which in case of necessity may still be made available,* continued until the year 1883, when by the 3 & 4 Will. IV. c. 42, s. 21,† a defendant in certain actions was authorised by leave of the Court to pay into Court a sum of money by way of compensation and amends in such manner and under such regulations as to costs and the form of pleading as might be ordered by general rules of pleading; and by r. 17 Reg. Gen. Hil. T. 4 Will. IV., it was directed that the form of plea should be as follows, or as near as might be:—

“The defendant says that the plaintiff ought not *further* to maintain his action, because the defendant now brings into Court the sum of £ ready to be paid to the plaintiff, and says that the plaintiff has not sustained damages to a greater amount than the said sum, wherefore he prays judgment if the plaintiff ought further to maintain his action.”

And under r. 19 the plaintiff was at liberty to reply, accepting the sum in full satisfaction and discharge of the cause of action, and to tax his costs; or he might reply that he had sustained damages to a greater amount, and in the event of an issue thereon being found for the defendant, the latter became entitled to judgment and his costs of suit.

So the law and practice continued down to 1852, and up to that time there is no trace of any law authorising the Court to give judgment in the action in favour of a defendant upon a defence of payment of money into Court in satisfaction,

* See Ord. LXV. of Rules of 1883. † Repealed by 37 & 38 Vict. c. 35.

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coupled with a condition that the plaintiff shall establish his, the defendant's, liability, which he in the very words in which he pays the money into Court still declines to admit.

By the Common Law Procedure Act, 1852, s. 70,* for the first time the absolute right was conferred upon a defendant "to pay into Court a sum of money by way of compensation and amends;" and by s. 71 it was required to be pleaded as near as might be in the following terms:—

"The defendant brings into Court the sum of £ , and says that the said sum is enough to satisfy the claim of the plaintiff."

And by s. 73 the same consequences were attached to a plea of payment into Court, as had been provided by r. 17 Reg. Gen. Hil. T. 4 Will. IV.

During the whole time from 1833 to 1875 a defendant was never allowed, according to the practice, to plead such a plea together with other defences, it having been considered a sufficient objection to such a course that it might lead to contradictions and inconsistencies upon the face of the record, as, for example, in the event of the defendant defeating the plaintiff's cause of action altogether.

If, however, a contrary practice had prevailed, and defendants had been allowed to plead this plea together with others, it could have made no difference in the form or the substance of the plea, which, as alone authorised by the statutes, must have contained within itself a simple unconditional confession of the cause of action pleaded to, and an unequivocal and unconditional tender of amends. This was the universal and, I have no doubt, the correct reading of the statutes authorising a payment of money into Court by way of satisfaction and amends. If the Court had given leave to a defendant to plead together (1) *non-assumpsit*, and (2) payment into Court, and the defendant had pleaded the second in the following form: "The defendant, if liable, which he does not admit, brings into Court the sum of £ , and says that it is enough to satisfy the plaintiff's claim," such a plea would have been wholly inadmissible and unauthorised, not merely by the rules of practice and procedure, but by the law itself, because it amounted neither to a defence to the action nor a plea to the further maintenance of the action by an offer of full satisfac-

* Repealed, in a qualified manner, by 46 & 47 Vict. c. 49, § 5.

tion as authorised by the statutes. Up to this time it will be observed that the plea of payment into Court never constituted a defence to the action in the strict sense, it was merely allowed as a plea to the further maintenance of the action, and did not entitle the defendant to claim judgment in the action except upon the condition of his confessing the cause of action and tendering amends to the plaintiff.

Thus the law and practice continued down to the passing of the Judicature Acts, 1873—5.

The first thing to be observed in relation to these Acts is, that although they made great changes in the practice and procedure, they made no change in the substantive law so far as relates to the matter under discussion.

The enactments upon the subject are contained in the Judicature Act, 1875, s. 16, and Schedule I., Orders XIX. to XXX. Under these enactments it became no longer necessary for a plaintiff to set forth his claims in formal counts, each containing a definite cause of action, nor for a defendant to set forth his defences in separate and distinct pleas, each directed specifically to definite causes of action and containing each a complete and entire defence.

The parties are required to state their respective claims and defences in clear and concise language.

Each pleading is to contain "as concisely as may be a statement of the material facts upon which the party pleading relies ; such statement being divided into paragraphs numbered consecutively, and each paragraph containing, as near as may be, a separate allegation."

By Order XXX. it is enacted that, in certain actions, a defendant may at any time after service of the writ "pay into Court a sum of money by way of satisfaction or amends," and the plaintiff may accept the same in satisfaction and tax his costs, or he may, as before, reply that the amount is not sufficient, and if upon an issue thereon the verdict is in favour of the defendant, the same consequence follows as before, viz :—that the defendant becomes entitled to judgment and his costs of suit. There is however absolutely no change in the substantive law which has continued unchanged from 1833 to this day.

Thus, under the Judicature Acts, great freedom and latitude is allowed as to the form and manner of pleading. Any

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number of claims may be joined and any number of defences may be pleaded together, subject only to the restriction that they are not too prolix and confusing, nor framed in a manner to embarrass or delay the fair trial of the action. At the instance of either party complaining, the Court has power to order any pleading offending against this rule to be struck out or amended. Owing, however, to the carelessness or indifference of the parties, great laxity and irregularity has crept into the manner of pleading, to the great perplexity of the Judges who have to try the action, and there has been great diversity in the manner and form in which defendants have paid money into Court, sometimes paying it in unconditionally to be accepted by the plaintiff in satisfaction if he is willing to accept it, and sometimes paying it in to be taken in satisfaction if the plaintiff should establish his title to compensation. One thing, however, is perfectly clear that no new law was enacted conferring any further rights of defence by payment of money into Court, than had been conferred upon defendants by the 3 & 4 Will. IV. c. 42, re-enacted without the slightest addition in the Common Law Procedure Act, 1852, s. 70, and the Judicature Act, 1875, s. 16, and Sched. 1, Ord. XXX.

In the present case, the plaintiff having brought an action for damages for trespass to land, the defendants pleaded a defence divided into three parts: by the first, they pleaded what was equivalent to the old plea of not possessed; by the second, they pleaded what was equivalent to the old plea of leave and license under a title paramount; and thirdly, they stated that without admitting the plaintiff's claim, they brought into Court the sum of 5*l.* and said that it was sufficient to satisfy the plaintiff's claim.

No objection was taken to this form of pleading as being embarrassing, and no question of embarrassment arises either directly or indirectly. The plaintiff joined issue upon all the defences. The cause came to trial and the verdict was for the plaintiff upon the questions of liability, and for the defendant upon the question as to the sufficiency of the amount of damages; and the simple question now is, whether this last pleading amounts to the plea of payment of money into Court by way of satisfaction and amends, as authorised by the statutes, or falls short of that, and amounts only to a

statement raising an issue merely as to the quantum of damages in case the plaintiff succeeds in establishing the defendant's liability, which is not admitted.

If the latter is the true meaning, it would of course constitute neither a defence to the action nor to the further maintenance of the suit under any of the statutes authorising such a defence. In my opinion such a pleading amounts to no more than a deposit of 5*l.* in Court, together with an allegation that it is sufficient to satisfy the claim in the event of the plaintiff establishing the defendant's liability, which in the same sentence is disputed.

The question in this case is not whether a defendant ought to be allowed to plead, concurrently, a defence wholly denying the cause of action, and an alternative defence to the further maintenance of the action by a payment of money into Court by way of satisfaction and amends; but whether the present pleading does in substance and in fact amount to such a defence to the further maintenance of the suit as is authorised by the statutes, and if not what is the effect of it.

In my opinion this is not in substance a sufficient defence to the further maintenance of the suit as authorised by any statute, and that it amounts only to a conditional admission and averment as to the quantum of damages with a deposit of the amount in Court. It is contended, however, that the case of *Berdan v. Greenwood* in the Court of Appeal (L. R. 3 Ex. D. 251) is an authority to the contrary. It is scarcely necessary for me to state that if I could have read this case as being a decision to the contrary I should at once have accepted it and acted loyally in accordance with it, even if I was unable to take the same view myself. I am, however, unable to read *Berdan v. Greenwood* in such a sense, and the decision is one in which, I may say with deference and respect, I wholly and entirely agree. I read that case as deciding that it is allowable to a defendant to plead concurrently a defence denying liability, with a defence to the further maintenance of the action by payment into Court of a sum of money by way of satisfaction and amends, provided the combination of defences does not produce embarrassment; and, secondly, that in the particular case after the defendant had consented to abandon certain defences, all embarrassment was removed. The case was this. It was an action brought to recover a

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large sum for commission, the defendant pleaded denying liability; he also set up fraud on the plaintiff's part; and lastly, he concluded in these words: "Lest contrary to what the defendant believes and contends he is under any liability to the plaintiff he brings into Court the sum of £190, and says that it is enough to satisfy the plaintiff's claim." The plaintiff applied to a Judge at Chambers to strike out this last defence as embarrassing in such a form and pleaded together with defences of fraud, and it was struck out. The defendant appealed to the Divisional Court and this decision was affirmed. The defendant then appealed to the Court of Appeal, when under the stress of the same arguments as had been urged against him in the Courts below, the defendant consented to amend his pleadings by abandoning all his defences of fraud, and also agreeing to treat the money paid into Court as absolutely, and not merely conditionally, appropriated to the purpose of satisfaction and amends, so that the plaintiff might take the money out at once in satisfaction and sign judgment for his costs. This appears by Lord Justice Thesiger's judgment at pages 255—6, and is in accordance with my own personal recollection of the argument which I heard.

Lord Justice Thesiger, who delivered a written judgment on behalf of himself and Lord Justice Brett, proceeds to deal with the case upon the footing that the defendant proposed to plead together two defences: first, a denial of all liability; and secondly and alternatively, a simple, absolute and unconditional payment into Court of a sum of money by way of satisfaction and amends. The actual decision of the case proceeded upon this basis, and it is important to notice that the objection had been taken by the plaintiff that the money was not paid into Court by way of satisfaction and amends, and that this objection was at once removed by the defendant's concession that the pleadings might be treated as absolutely appropriating the money to the plaintiff in satisfaction: and there could not therefore be any actual decision, properly so called, upon what ought to have been the true interpretation of such a pleading if issue simply had been taken upon it; and Lord Justice Cotton, who agreed in the judgment, expressed his distinct opinion that a pleading in such a form was not a payment into Court as authorised by the Common Law Procedure Act,

sect. 71, and he states it as his opinion that the question would yet have to be determined whether, if the plaintiff joined issue on such a pleading and established the defendant's liability but failed to establish a claim to more than the defendant had paid into Court, the plaintiff or the defendant would be entitled to judgment in the action.

After the defendant had consented to abandon the charges of fraud, and had admitted and even asserted that the money paid into Court was absolutely appropriated to the purposes of satisfaction, all the Lords Justices agreed that there was no embarrassment to the plaintiff arising merely from the fact that such contradictory defences were pleaded concurrently and alternatively, and under these circumstances the defendant was permitted to retain his defence of payment into Court, and the orders of the Judge at Chambers and of the Divisional Court were, as it is described, reversed. In this result I venture with deference and respect to concur; and so strong was my own opinion upon this point, that shortly before that decision, viz., in 1877, I declined as counsel for the plaintiff, in the case of *Potter v. The Home and Colonial Insurance Company*, to argue the point; and I agreed at once that the defendants were entitled in an action upon a Marine Policy of Insurance to plead a defence of unseaworthiness, which went to the whole cause of action, concurrently with a pleading of payment into Court in satisfaction.

It seems to me, therefore, that *Berdan v. Greenwood* necessarily left the present question undecided.

For my own part, I not only agree with the actual decision in *Berdan v. Greenwood*, but I venture to go a step further, and to state that I see no objection upon principle, to a defendant, even without bringing any money into Court, disputing the amount claimed by the plaintiff as exaggerated and excessive, and stating that even if the plaintiff is entitled to recover anything, which the defendant denies, his claim cannot exceed a certain sum, which the defendant is willing to admit that the plaintiff is entitled to, if the defendant is liable. I see no objection whatever to such a pleading, and I have long been surprised that it has not been resorted to. Take, for example, an accident case, in which very distinct questions arise as to liability and as to the quantum of

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damages, involving quite distinct inquiries, with a different class of witnesses. Why should not a defendant, while denying liability, raise a distinct issue as to the amount of damages, and so, if possible, eliminate a separate and expensive inquiry? I can see no objection; but on the contrary much advantage in allowing the parties to raise such an issue. If the defendant succeeds in obtaining a verdict upon such an issue, but fails upon the question of liability, it would not of course entitle him to judgment in the action. The plaintiff in that case would be entitled to the judgment of the Court for the amount conditionally admitted to be due, and would have his costs of the action, and the defendant would be entitled to the costs of the inquiry as to the quantum of damages. It appears to me that if a defendant desires to plead a denial of liability, and together with that to plead a payment into Court of a sum of money in satisfaction, he is clearly entitled to do so, unless in the particular case it produces real embarrassment. But if he does so plead, he ought to plead the payment into Court as a true and real alternative, with an offer of confession of the cause of action, and an unconditional tender of the money by way of amends. Anything short of this is clearly not within the Statutes allowing such a payment to be pleaded. It is stated that the new Rules of 1883, have made some alteration rendering the present question no longer of practical importance. I do not think that this is so, but if there is any new rule authorising the Court to give judgment in the action in favour of a defendant who has succeeded upon a pleading of conditional payment of money into Court, where the money has not been offered absolutely in satisfaction, but conditionally only upon the defendant's liability being established, and without an admission of liability, then in my opinion such a rule is *ultra vires*,* as no statute has ever authorised such a pleading as a defence of any sort.

In the present case, therefore, I am of opinion that the

* The rules and orders of 1875 were enacted by Parliament, and formed part of the Judicature Act, 1875.

The rules and orders of 1883 are judicial rules only, and were made under the authority con-

ferred upon the judges by sect. 17 of the Act of 1875, to make rules for carrying the Judicature Acts into effect, and regulating the pleading and practice of the Courts.

plaintiff having succeeded in the action in establishing the liability of the defendants, and the defendants having failed in establishing any complete defence to the action, or any defence to the further maintenance of the suit within any of the statutes authorising such a defence, and having only succeeded upon a secondary issue as to the quantum of damages, the plaintiff is entitled by law to the judgment of the Court for 5*l.*, and the defendants are entitled to their costs of the issue upon which they have succeeded.

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Parker & Ponsford.

Payment into Court is at present regulated by Order XXII. of the Rules of the Supreme Court, 1883. The question whether or not the money is paid into Court by way of satisfaction, would seem to depend upon the true construction of the pleading; and, although a party may have no *right* to pay money into Court otherwise than by way of satisfaction, the proper course would rather seem to be to refuse to allow the money to be paid in if offered on other terms than to receive it into Court and deem it to have been paid in on terms other than those expressly stated to be the ones on which it is paid in.

WILLIAMS, J., and a C. J.

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THIS was an action to recover the manuscript of a play of which the plaintiff was the author, and which had been sent by the plaintiff to the defendant under the following circumstances:—

The defendant was the manager and lessee of Drury Lane Theatre, and in March, 1882, received a letter from the plaintiff stating that he had written a play and asking the defendant to assist him in producing it. To this the defendant replied that if the plaintiff would send to him the scene, plot, and sketch of the play he would look through it. The plaintiff accordingly on the 27th of March, 1882, sent to the defendant the scene, plot, and sketch, *and also the play itself*. The plaintiff made numerous applications from time to time with reference to the play, and at last in January, 1883, demanded back the play; but the play was not returned, as it could not be found. The plaintiff then brought this action.

There is no duty cast upon the recipient with respect to goods sent to him voluntarily by another, and unsolicited by the recipient.

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The plaintiff admitted that he had a copy of the scene, plot, and sketch, and that he made no claim in respect of the non-return of these.

Cock and C. C. Scott, for the plaintiff.

Clarke, Q.C., and Trevor White, for the defendant.

WILLIAMS, J., held that there was no case to go to the jury, for the plaintiff had chosen voluntarily to send to the defendant what the defendant had never asked for, and no duty of any sort or kind was cast upon the defendant with regard to what was so sent.

Judgment for the defendant.

Montagu Scott & Baker.

James Davis.

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HOLLMAN v. PULLIN.

There is no rule of law by which an agent professing to contract on behalf of a principal, either non-existent or under a legal disability to contract, is to be deemed to be himself the contracting party.

THIS action, as appeared by the endorsement on the writ, was brought by the plaintiff, "as chairman of and on behalf of the Tunbridge Wells Benefit Societies' Medical Association, for an injunction to restrain the defendant from practising as a medical practitioner within a certain area contrary to the terms of an agreement of August 15, 1882; made between the plaintiff as chairman and on behalf of the Association of the one part and the defendant of the other part," and the great question was, whether there was any contract upon which the plaintiff could personally sue the defendant. The case was this:—

In May, 1882, the following advertisement appeared in the *Lancet*:—"Wanted, a qualified resident medical officer for the Tunbridge . . . Medical Association. Applications . . . to the Secretary, Mr. J. Wallis, Tunbridge Wells."

The defendant answered this, asking for particulars. A printed copy of particulars and conditions of the appointment were sent to him, at the end of which it was stated that the medical officer "on his appointment will be required to enter into an agreement embodying the above conditions."

On May 26th the defendant sent a letter addressed to the

Association, offering himself as a candidate and forwarding testimonials, and shortly afterwards had an interview with the Committee of the Association, when he was finally engaged by them upon the terms and conditions already referred to.

On the 24th June the Association was completely established with a Committee and the usual officers. A set of rules was published. Mr. Hollman, the plaintiff, was announced as President of the Association and Chairman of the Managing Committee, Dr. Pullin, the defendant, as resident medical officer, and Mr. James Wallis as Secretary, and the Association commenced its operations with 1708 members, and Dr. Pullin entered upon his duties as medical officer.

On the 15th August the defendant being required by the Committee to enter into the promised agreement signed the following form with Hollman the Chairman :—

“Memorandum of agreement made and entered into . . . between James Hollman, as Chairman and on behalf of the Tunbridge Wells Benefit Societies' Medical Association, of the one part, and F. B. and Pullin of the other part; whereby F. B. Pullin, in consideration of the appointment of medical officer to the Association, hereby agrees to enter into the following conditions, restrictions, and regulations, namely :—

1. To reside at the surgery. . . .
2. To visit and attend sick members. . . .

* * * * *

9. Upon leaving the service of the Association he shall not be allowed to practise within an area of 3 miles under a penalty of 200*l*.

* * * * *

And the said James Hollman agrees on behalf of the Association to pay F. B. Pullin the amount of salary and other fees.

(Signed) F. B. PULLIN,
JAMES HOLLMAN,
Chairman.

The Association was one requiring to be registered under the Friendly Societies Act, and was not so registered. On the 26th March, 1883, Pullin left the service of the Associa-

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tion and practised within the prescribed area, whereupon this action was brought.

Glasse, Q.C., and T. Rolles Warrington, for the plaintiff, claimed upon these facts to be entitled to an injunction.

R. T. Reid, Q.C., and Chadwick Healy, for the defendant, contended that there was no contract between him and the plaintiff personally.

WILLIAMS J.—“The defendant is entitled to judgment. It has not been established that the defendant had entered into the relation of contracting party with the plaintiff personally. Up to the 15th August the facts show conclusively that the defendant contemplated entering into a contract with the Association only. No doubt, if the instrument signed by the defendant and the plaintiff on that date had clearly and expressly described the two signatories as entering into a personal contract with each other, that would have been decisive, whatever might have been the intentions of the defendant up to that moment. The language of the instrument, however, is not inconsistent with the position, evidently intended by the defendant, that he was contracting with the Association, and signed the memorandum with the plaintiff as their representative only.

Mr. Glasse, however, contended that, inasmuch as the Association was without any legal existence and without any capacity to contract according to law, the contract must be regarded as having been entered into by and with the plaintiff personally; and he maintained this upon the ground that it was a general principle of law that wherever an agent or a representative affected to conclude a contract on behalf of an alleged principal, and no such principal existed, the agent was in law himself the contracting party; and for this he cited the authority of *Kellner v. Baxter*, L. R. 2 C. P. 174. There is however no authority for laying down such a proposition as a rule of law. If an alleged agent professes to conclude a contract in the name, and on behalf of an alleged principal, and without using language expressing that he contracts personally, no rule of law can convert his position into that of a contracting party, by reason only of there not having been at the time any principal in existence who could

be bound. He may be liable for a false representation, or for a breach of warranty of authority, if the true facts would sustain either cause of complaint.

A simple illustration of an agent, without being guilty either of fraud or of breach of warranty of authority, professing to conclude a contract for a non-existing principal, is to be found in the ordinary case of an agent openly acting under a power of attorney for a principal who, unknown to all the parties, is dead at the date of the contract; and it would be a manifest absurdity to contend that in such a case the agent would by law have become himself the contracting party. See the cases of *Polhill v. Walter*, 3 B. and Ad. 114; *Collen v. Wright*, 8 E. & B. 647; 27 L. J. Q. B. 217.

At the same time, although there is no rule of law by which a mere agent not professing to contract is converted into the contracting party simply because he has no principal, nevertheless it frequently happens that a person professing to act as agent for another and having really no principal may so conduct himself as to become a real contractor with the other party, and if the true facts sustain this relation, and it is not in contradiction to the express language of any written memorandum, then undoubtedly the supposed agent is himself the contractor.

It must not be assumed that the question admits of the same solution whether the supposed agent is suing or is being sued. It might well be that an agent who without any real principal induced another to accept a contract might find it difficult upon the facts to escape from personal liability as himself the contractor, and yet if he himself were endeavouring to sue on the same contract he might find the difficulty reversed when he endeavoured to enforce it against one who denied that he ever entered into such relation with him personally.

The case of *Kellner v. Baxter*, so much relied upon by Mr. Glasse, is entirely in accordance with the principles here stated, and is no authority for the broad proposition contended for by him; it was an action for the piece of goods sold and delivered, and the case was this:—

The defendants were projecting the formation of themselves and others into a limited company for the purpose of carrying on an hotel at Gravesend. The plaintiff, a Wine

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Merchant, being aware of this, addressed to them the following letter—

“To J. D. BAXTER, N. J. CALISHER, and J. DALES, on behalf of the proposed Gravesend Royal Alexandra Hotel Company Limited.

“Gentlemen, I hereby propose to sell the extra stock now at the Assembly Rooms, Gravesend, as per schedule, for 900*l.*, payable 28th February.

(Signed) “JOHN KELLNER.”

At the end of which the defendants wrote as follows :—

“Sir, we have received your offer to sell the extra stock as above, and hereby agree to and accept the terms proposed.”

(Signed) J. D. BAXTER,
N. J. CALISHER,
J. DALES.

On behalf of the Gravesend Royal Alexandra Hotel Co. Limited.

No company was at this time actually formed, but the goods were delivered by the plaintiff at the hotel of the proposed company, and the business having been commenced the goods were consumed. The company was not incorporated until February 20th, and so far as it was competent for it to do so, it ratified and adopted the contract of January 27th, and shortly afterwards collapsed ; at the trial, *Erle, C.J.*, left the case to the jury, who found a verdict for the plaintiff, leave being reserved to the defendants to move for a non-suit, if no personal liability could in law be established on the above facts.

A rule *nisi* having been obtained, it was afterwards discharged, the Court holding that there was evidence that the defendants had contracted personally with the plaintiff for the purchase of the stock, and that there was nothing in the language of the written contract expressly at variance with this, and that the supposed ratification by the company was of no effect, because the company having had no existence at the date of the contract there was nothing to which their ratification could apply.

The present case is essentially different in its facts from

that, and the relative positions of the parties is also the exact converse. The action therefore must be dismissed with costs.

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Collyer, Bristow, Russell, Withers & Hill.

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A person who enters into or signs a contract merely as agent on behalf of a named principal, may (1) Actually have such a principal, and the authority of such principal to enter into the contract, and the principal is under no disability preventing his entering into the contract. (2) Actually have such a principal, and no authority from the principal, but the principal is under no legal disability preventing his entering into the contract. (3) Actually have such a principal, and the authority of such principal, but the principal is under a legal disability preventing his entering into the contract. (4) Actually have such a principal, but no authority from the principal, and the principal is under a legal disability preventing his entering into the contract. (5) Have no such principal at all. In (1) the agent is under no personal liability on the contract, or otherwise. In (2) the agent is not personally liable on the contract, but is liable for breach of implied warranty of authority (*Collen v. Wright*, 8 Ell. & Bl. 647 ; 27 L. J. Q. B. 217.) In (3) it is difficult to see how the agent would, in the absence of fraud, be liable at all ; for as he has in fact authority, the case does not come within the principle of *Collen v. Wright*, while, if the agent were considered to have made any representation as to his power to bind his principal, or his principal's right to contract, these would seem to be representations not of fact, but of law, for which no action will lie. See per Mellish, L.J., in *Beattie v. Lord Ebury*, L. R. 7 Ch. App. 800. In (4) the agent would seem to be liable on the principle of *Collen v. Wright*, though if the only damages sustained by the plaintiff were the loss of his legal rights against the principal, only nominal damages would be recoverable, as no such legal rights would have been created, even if the agent had had the authority of the principal. In (5) the agent would be liable, according to the principle of *Collen v. Wright* ; but he would not be liable on the contract, unless the facts showed that the name given as that of the principal, was a mere *alias* of the agent himself.

SMITH, J., and a C. J.

TEW v. THE NEWBOLD-ON-AVON UNITED
DISTRICT SCHOOL BOARD.

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A contractor undertook to execute works, with addition, enlargement, &c., within a specified time, the architect having power to extend the time for completion in proportion to the extra works so ordered. Additions were ordered and executed, and caused delay in completion of the works beyond the time specified, but the architect did not extend the time. Held, that the contractor was bound to complete the works within the time specified, and was liable to pay for the stipulated damages for non-completion within such time.

THIS was an action by a builder for an alleged balance, due to him for the erection of a schoolhouse for the defendant Board tried at the Leicester Winter Assizes. The contract under which the work was executed contained (*inter alia*) the following clauses.

"The contractor shall well and substantially, and in the best manner, with the best materials of their respective kinds, and under the directions and inspection of the Architect of the Board, make, execute, furnish and complete, and deliver over to the Board on or before the 12th of November, 1881, the several works, acts, matters, and things mentioned or referred to in the specification plans and drawings already prepared by the architect, and signed by the contractor, with such addition to, enlargement or alterations of, and deviation from the said work, if any. The architect may from time to time during the progress of the said works direct that further time shall be allowed in proportion to the works so ordered to be done. The contractor shall find all materials specially directed, labour, service, tools, scaffolding, implements, utensils of every kind requisite for the completion of the work."

"In case the works and things hereby contracted to be done by the contractor shall not be done and completed at the time hereinbefore mentioned, the contractor shall pay on demand to the Board, as liquidated and ascertained damages, a sum not exceeding five pounds for each and every week which may elapse between the appointed and actual time of completion and delivery hereinbefore mentioned; or the Board may deduct the same from any monies payable to the contractor, allowance being made for delay occasioned by alterations and other causes as before provided for."

The contract was not under seal.

Certain extra work and additions had been ordered and executed, but the architect had not directed that any further time should be allowed for the same. The jury at the trial found that the extra works ordered delayed the plaintiff and prevented him from completing within the specified time. The defendants claimed to retain 35% in respect of 7 weeks'

delay beyond the time specified for executing the works, and also contended that no action would lie against them, the contract not having been under seal, and these were the two questions in the action.

Buszard, Q.C., and *Morten Daniel*, for the plaintiff.
Dugdale, Q.C., and *W. Graham*, for the defendants.

The case was argued before his Lordship on further consideration in London on the 19th of March.

The following authorities were cited:—(1) As to the necessity of a seal. *The Mayor of Ludlow v. Charlton*, 6 M. & W. 815; *Hunt v. The Wimbledon Local Board*, L. R. 4 C. P. D. 48; *Young v. Mayor, &c., of Royal Leamington Spa*, L. R. 8 App. Cas. 517; (2) As to the defendants' right, under the circumstances to claim for damages for delay in executing the works. *Westwood v. The Secretary of State for India*, 11 W. R. 261, 7 L. T. N. S. 736; 1 N. R. 262; *Jones v. St. John's College*, L. R. 6 Q. B. 115; *Russell v. Bandeira*, 13 C. B. (N. S. 149); 32 L. J. C. P. 68; *Roberts v. The Bury Commissioners*, L. R. 4 C. P. 755; L. R. 5 C. P. 310.

SMITH, J.—On the question as to the necessity of a seal in this case, I express no final opinion, though my impression is that such a contract as the one in the present case does not fall within the class of contracts, in which the necessity of a seal can be dispensed with. As to the other question, it turns upon the proper construction of the contract. What has the builder contracted to do? To complete, within the specified time, the buildings only? or the buildings and any additions ordered? In the former case, the principle of *Russell v. Bandeira* might have applied; but in my opinion the builder has contracted to execute the additions within the specified time, and trusted to the generosity of the architect to allow him any extension of time. *Westwood's* case was relied upon by the plaintiff's counsel, but that case is distinguishable on the ground stated by Lush, J. in *Jones v. St. John's College*. The defendants were therefore entitled to deduct the 5*l.* per week, and there must be judgment for the defendants.

J. & W. Maude.

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HUDDLESTON, B.

JOSEPH *v.* WEBB.JOSEPH *v.* LYONS.JOSEPH *v.* PIDCOCK.JOSEPH *v.* JONES.

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A grantor of a bill of sale over jewellery left in possession of his stock in trade, has no power to pledge the same. The acquiescence which will deprive a man of his legal rights must amount to fraud.

A mortgagor of stock in trade, left in possession thereof, with power to carry on his business, is not the agent for sale of the mortgagee, within the meaning of the Factors' Acta.

A. sold his business to B., but continued to carry it on as manager for B. Afterwards B. resold the business and stock to A., taking a bill of sale over the stock to secure payment of the purchase-money. The business was carried on throughout in the name of A. Held, that pledgees of the stock from A., after his repurchase, did not acquire a title thereto by virtue of sect. 2 of the Factors' Act, 1877.

A bill of sale assigned stock, &c., which should or might at any time or times during the continuance of the security be brought into the shop and premises. Held, that the title of the grantee to stock subsequently acquired and brought on to the premises, prevailed over that of bona fide pledgees to whom the grantor had wrongfully pledged and delivered it.

THE facts and the arguments are fully stated in the judgment.

H. Matthews, Q.C., and A. T. Lawrence, for the plaintiff.

J. J. Powell, Q.C., Jelf, Q.C., and Clay, for the defendants.

HUDDLESTON, B.—These four actions were tried before me at Gloucester on the 15th February, without a jury by consent.

They were actions in which the plaintiff sought to recover from the defendants articles of jewellery, alleged by the plaintiff to belong to him, and detained by the defendants.

The plaintiff was a wholesale jewel merchant and manufacturer in Birmingham, the defendants Webb were pawnbrokers at Worcester, the defendant Lyons, a pawnbroker at Birmingham, the defendant Pidcock, a solicitor at Worcester, and the defendant Jones, an accountant of that town.

Prior to the year 1879, a person of the name of Frederick Manning had for many years carried on business as a retail jeweller in Worcester. He had incurred heavy liabilities to the plaintiff, and being in difficulties he transferred his business to the plaintiff, who paid off his existing liabilities, took the business at Worcester into his own hands, and carried it on under the name of Manning & Co. employing Frederick Manning under an agreement of the 21st of June 1876, as his manager of the business, paying him a yearly salary of 312*l.* payable weekly, and a certain percentage on the profits with

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power to terminate the agreement by six months' notice and stating that as between themselves nothing within the agreement was to constitute or create a partnership.

At this time, in paying off Manning's debts, the plaintiff became aware that Manning had pledged various articles of his stock with different people for pecuniary advances, and the plaintiff paid off those advances.

Under this agreement, Manning acted as the plaintiff's manager, the business being carried on under the name of Manning & Co. until the year 1881. Manning received his salary during that period, but no percentage on the profits was paid to him, it being alleged that all the profits had been swallowed up by extensive improvements made in the business, and it was suggested that the business was one of about 5,000*l.* a year turnover, and yielding an annual profit of something between 1000*l.* and 1200*l.*

In the year 1881, negotiations were entered into between Manning and the plaintiff for the disposal of the business by the plaintiff to Manning. Manning was to find a sum of 1000*l.* down, and two sums of 500*l.* On the 15th of January 1881 and 15th of May 1881, the stock and goodwill was taken at 5049*l.* 7*s.* 11*d.* and the balance was to be secured by a Bill of Sale. The 1000*l.* was to be found for Manning, by Mr. Beauchamp, a solicitor, and the other two sums of 500*l.* were to be provided by Mrs. Manning who had private property.

In the course of the negotiations referred to the plaintiff wrote to Manning on the 31st January 1881, a letter in which he said :—

"In reply to your letter you may rest assured that I shall not take possession under the Bill of Sale, if the instalments with interest are duly and regularly paid, as well as your rent and fire insurance, as long as no pressure is exercised upon you by any other creditor or creditors, or any steps taken by you or any other person or persons leading to bankruptcy or liquidation of your affairs by arrangement or otherwise, under or exclusive of any Act of Parliament now existing, or at any time to be in existence during the continuance of the Bill of Sale. But this is of course subject to your carrying on the business in the usual and ordinary way, and that the stock is not made away with or sold otherwise than in the ordinary course of a retail trade."

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The plaintiff on the 3rd of February, 1881, sold the business to Manning, and on that date Manning gave the plaintiff a Bill of Sale.

The Bill of Sale recited the purchase by Manning of the business for the sum of 5049*l.* 7*s.* 11*d.* the agreement to pay the 1000*l.* at the time of the completion of the contract, 500*l.* on the 15th of January 1881, and 500*l.* on the 1st May 1881, and the balance of 3049*l.* 7*s.* 11*d.* by half yearly instalments of 200*l.* each and the securing of the last mentioned 500*l.* by bills of exchange. It was also agreed by the said Bills of Sale that the said balance of 3049*l.* 7*s.* 11*d.* and 500*l.* should be secured in the manner afterwards mentioned.

It was further recited that Beauchamp had advanced Manning the 1000*l.* which was also to be secured by that deed, and that the Bill of Sale witnessed that in consideration of the premises, Manning had assigned to the plaintiff his executors administrators and assigns, all and singular the goodwill and interest of Manning in the business of a goldsmith, silversmith and jeweller carried on by him at 64, High Street, Worcester, and also all and singular the stock-in-trade fixtures and fittings, plate, china, linen, chattels and other effects and things on or about or belonging to the said shop, dwelling-house and premises, and also the stock-in-trade, trade fixtures and fittings, goods, chattels and effects which should or might at any time or times during the continuance of that security be brought into the aforesaid shop, messuage or dwelling-house and premises, or be appropriated to the use thereof either in addition to or in substitution for the stock-in-trade, fixtures and fittings, goods, chattels and effects being therein or belonging thereto or any of them.

There was a power to reassign on payment by Manning, of the whole of the principal and interest, and in the meantime Manning was to retain possession, but was not to remove any of the goods or chattels without the consent of the plaintiff.

There was a power given to the plaintiff to inspect the shop and to take schedules and inventories for all reasonable purposes.

There was a power to enter upon non-payment of the principal or interest and an arrangement by which Beauchamp was to be repaid rateably with the plaintiff, and the other usual clauses, and concluding with an agreement that all

future property thereinbefore expressed to be assigned should be subject to the security thereby made, and the powers, covenants and provisions thereinbefore contained, although the same or any part thereof might not be capable of passing at law by the assignment thereinbefore contained, and the expression "the chattels and premises" used in these presents should in all cases, extend to and include such future property.

This Bill of Sale was duly registered, and was by the plaintiff's direction inserted in Stubbs & Perry's Circulars. From that date, Manning carried on the business on his own account at Worcester, during which time Manning received from time to time considerable pecuniary assistance from the plaintiff. He dealt with the plaintiff for goods in the way of his trade, but he also dealt with other manufacturers and wholesale dealers, and obtained from those manufacturers and dealers large quantities of goods. He seems also, unknown to the plaintiff, to have raised money from time to time by pledging portions of his stock with some of the defendants and other persons. The goods so pledged consisted of articles included in the Bill of Sale and some acquired subsequently. I shall have to advert more particularly to these two different classes at a subsequent period of my judgment.

In the month of March, 1888, Mr. Beauchamp wrote to the plaintiff, saying :

"I am not at all satisfied with the manner in which Mr. Manning is carrying on his business, and am not sure whether our security is not being prejudiced. It will be well if you can come here and see me without delay, when matters can be more fully explained. Any day but Thursday will suit me.

"Yours truly, A. J. BEAUCHAMP."

The plaintiff wrote to Mr. Beauchamp asking him to come to Birmingham, and received in answer the following reply :

"March 7th. Dear Sir, My business engagements will prevent my going to Birmingham at present, and as it is inconvenient for you to come here, I think I had better say what I have to say on paper. Mr. Manning has not carried out his arrangements to reduce the sum advanced by me to him, and from what I have heard the last few weeks, I believe he has resorted to betting and drinking, and consequently

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does not attend properly to his business. What I more particularly complain of however, is that he has deposited valuable goods with various persons in this city, as security for advances made to him, and these goods really form part of the effects included in the Bill of Sale given to you in which I am also interested to a considerable amount. I think that it is very desirable that an account of his stock should be taken, and his books inspected by some person qualified to do so (this should be done as a preliminary step), and perhaps after all it may be found necessary to realize our security. In the present state of affairs I am not disposed to rest content, and unless matters appear to be in a more satisfactory position than I am led to believe they are, I must ask you to take steps to bring the whole thing to an issue. I shall be glad to know whether he has fulfilled his engagements to you, and what is the amount now due?"

On the 10th March, Beauchamp wrote again:

"I have Manning's letter giving the names of 5 persons with whom he has deposited goods as security for advances made. Whether or not it will be to our mutual advantage to take possession, I know not, but I do think a check ought to be placed upon the mode in which the business is being carried on. On Wednesday afternoon I shall be here and pleased to see you. I send you Manning's letter to me which you will treat with confidence and return to me."

The letter enclosed from Manning to Beauchamp was to this effect:

"Dear Sir, John Jones, W. C. Quarrell, Laurie, Pidcock, Pike, are the only persons who hold securities, and all beneath the value of their advances. I promise you not to pledge any more stock without your knowledge, and to redeem, and let you know when, that already pledged. The money has all been devoted to the business. I am equally anxious as yourself to right the ship and will try and do so. Don't think me callous, and don't believe all that's told you. I have given up betting and drinking in the morning."

A day or two after this letter the plaintiff came over to Worcester. He had an interview with Manning alone, and afterwards in Beauchamp's presence. Manning denied the extent of the statements that had reached Beauchamp's ears, promised amendment, and seems effectually to have satisfied

both the plaintiff and Beauchamp that they had no cause of apprehension, that all was right at that moment, and that by his future conduct he would not expose them to any danger. Manning was a person of a very plausible character, and I could not doubt that he effectually allayed any apprehension that might have existed in the mind of the plaintiff and Mr. Beauchamp. The plaintiff made inquiries with satisfactory results, and Mr. Beauchamp, himself a solicitor of some experience and practice, yielded to Manning's representations, and concurred with the plaintiff in giving Manning what they called another chance.

However, in October information reached the plaintiff from Mr. Beauchamp. He went over to Worcester, and from what he there learned determined to put the Bill of Sale in force and took possession.

The goods pawned with Webb and Lyons were received by them in their ordinary course of business as pawnbrokers. Mr. Pidcock, the solicitor, and Mr. Jones, the accountant, took the goods as security for advances made by them.

On the part of all the defendants it was alleged in their statements of defence that the goods were pledged with them with the knowledge and by the permission and authority of the plaintiff. There was no express consent or proof of actual knowledge or permission.

But it was urged that Manning had authority to deal with the goods in the ordinary course of trade, and the *National Mercantile Bank, Limited*, v. *Hampson* (5 Q. B. Div. 177), *Taylor v. McKeand* (5 C. P. Div. 358), and *Payne v. Fern* (6 Q. B. Div. 620) were quoted, and plaintiff's letter of the 31st January, 1881, to that effect was relied on. I was clearly of opinion that the obvious understanding of both parties being that the trade should continue, Manning would be fully justified in dealing with the goods in the ordinary course of his trade, and that there would be an implied authority to that effect.

But the defendants further contended that pawning the goods was in the ordinary course of Manning's trade; that was a proposition that I emphatically declined to accept, and held that the pledging of the stock-in-trade by a retail jeweller for temporary advances was not within the ordinary course of dealing in his trade and business. The defendants further

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pleaded that the plaintiff permitted Manning to have the goods in his possession and to deal with same in such a manner that the defendants were induced by the plaintiff's conduct to believe, and did in fact believe, that Manning had authority to pledge the same. This was what they called the standing-by doctrine, and they urged that as plaintiff had paid off previous pledges in 1876, he must have been aware of this subsequent course of conduct by Manning. I however find as a fact that the plaintiff had no express knowledge of these pledgings by Manning, and that he did not permit Manning to deal with the goods as Manning did. This standing-by doctrine must be subject to the proof that the plaintiff had knowledge of what Manning was about to do.

With regard to knowledge, the late M. R., in the case of *Ex parte Ford, In re Caughey*, 1 Ch. D. 521 (p. 528) says, "If the appellant is to succeed at all, he must succeed either on the general equitable doctrine of which *Troughton v. Gitley*, (Ambler, 680), is only an example, that a man cannot stand by having a charge or incumbrance upon property, and allow another to advance money on it on the supposition that it is unincumbered. That assumes that he has knowledge that the other man is going to advance money, and suppresses the fact of his own interest. So the owner of land may not stand by and allow another person to lay out money in building on it, as "if it was his own land." "But there again you must say that he knew that the other person was laying out the money under the false belief that the land was his own. In my opinion, Lord Hatherley did not intend to lay down any other doctrine than this in his dictum in *re Rawbone's Trust*." Indeed such a defence must prove something in the nature of a fraud or misconduct, whereby one man suppresses, or permits to be suppressed, a fact which he knows to the detriment of another, or wilfully shuts his eyes, as said by Baron Parke, in *May v. Chapman*, (16 M. & W. 355), or wilfully abstained to do an act in order to prevent his having notice, as was suggested by Maule, J., in *Bird v. Base*, (6 M. & G., 148), and *Raphael v. Bank of England*, (35 L. J., C. P. 33), shows that means of knowledge would not be sufficient. Cockburn, C. J., in *Johnson v. Credit Lyonnais Company*, (L. R. 3 C. P. D. 33), says, after

referring to the case of *Kingsford v. Merry*, (11 Ex. 557), and other cases, "Sitting here in a Court of Appeal, I feel myself at liberty to say that these authorities fail to satisfy me that at common law the leaving by a vendee goods bought, or the documents of title, in the hands of the vendor till it suited the convenience of the former to take possession of them, would on a fraudulent sale or pledge by the party so possessed, divest the owner of his property, or estop him from asserting his right to it. If this had been so, there would have been, as it seems to me, no necessity for giving effect by statute to an unauthorised sale of goods by a factor. The doctrine* established in *Pickard v. Sears*, (6 Ad. & E. 469), and *Freeman v. Cooke*, (2 Ex., 654), and the subsequent cases which have proceeded on the same principle carry the case no further. In all the cases decided on this principle, in order that a party shall be estopped from denying his assent to an act prejudicial to his rights, and which he might have resisted, but has suffered to be done, it is essential that knowledge of the thing done shall be brought home to him." It would be carrying this doctrine much too far to apply it where advantage has been taken of a man's remissness in looking after his own interests to invade or encroach upon his rights, in the absence of knowledge on his part of the thing done, from which his assent to it could reasonably be implied.

It was urged strongly by Mr. Powell, with respect to his client, Mr. Webb, whose pledge took place on the 2nd April, 1888, and also with reference to Mr. Lyons, with whom goods were pawned on the 17th September, 1888, that as the plaintiff was aware in March by his correspondence with Beauchamp and his interview at Worcester, that Manning had been pledging, that that was such distinct knowledge as would amount to what he called a standing-by when the goods were so pledged in April and September, and he urged that the plaintiff was bound to take immediate steps to prevent a recurrence of the pledging.

I cannot think that the plaintiff as a prudent man could be expected to have at once destroyed Manning's position and his own chance of protecting his property by publicly notifying that Manning had broken faith with him. I think he was imposed upon, as was Mr. Beauchamp, by the assertions of

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Manning, an believed Manning's promises, and although it might perhaps have been better to have given an intimation to Mr. Jones and to Mr. Pidcock, whose names are mentioned in the letter of the 6th March, (as indeed it would have been better for the defendants, whose suspicions might well have been excited by Manning pledging his stock, to have searched the register whence they would have found his position with the plaintiff fully recorded), yet it cannot be said that, relying upon Manning's statements that he would redeem those pledges, and not pledge again, that he knew that Manning was going to make subsequent pledges with those persons. As a matter of fact, therefore, I find that the plaintiff had no such knowledge as would bring him within the standing-by doctrine. See *Knight v. Wiffen*, (40 L. J., Q. B. 50 ; L. R. 5, Q. B. D. 660 ;) *Carr v. London and North Western Railway Co.*, (L. R. 10, C. P. 307).

It was further urged that the transactions came within the meaning of the Factors' Acts, 6 Geo. IV., c. 94, 5 & 6 Vict. c. 39 ; and 40 & 41 Vict. c. 39. To bring the case within any of these Statutes it must be made out that Manning must be a person in the character of an agent intrusted with the goods for sale or pledge, or to carry out any part of a contract of sale or pledge, as pointed out in *Johnson v. Credit Lyonnais Company*, (L. R. 3, C. P. D. 33) ; where at pages 43—48, Bramwell, L. J., goes very fully into the whole question of the character of the person to be brought within the meaning of the Factors' Acts. The cases on agents contemplated and not contemplated by the Factors' Acts, are carefully collected in Mr. Turner's excellent book on the Contract of Pawn (2nd edition), p. 58. I do not think that Manning was an agent for the plaintiff within the meaning of those Acts. He was the mortgagor in possession with power to sell on his own account.

An agent is a person employed by another who is called the principal, to do some act for the principal's benefit, or on the principal's behalf. (Story on Agency, Sect. 3.) Manning was not to sell for the benefit of the plaintiff, nor on his behalf. The goods he sold were on his own account. It was urged by Mr. Jelf that because Manning had to make payments in discharge of his liability for the purchase of the business to the plaintiff, that the sale of the goods was for the benefit of the

plaintiff. This argument is ingenious, but it would apply to almost all cases in which persons have been held not to be agents within the meaning of the Factors' Acts. Mr. Jelf further urged that it came within Sect. 2 of 40 & 41 Vict. c. 39, and that Manning having been an agent or manager for the plaintiff from 1876 to 1881, that the deed of 1881 was a revocation of the agency. Sect. 2 of the Act, 1877, is said to have been passed to meet the case *Fuentes v. Montis*, L. R. 4, C. P. 98. But the transaction in February, 1881, was not a revocation of Manning's authority, but an entirely new transaction, viz., an absolute sale by the plaintiff to Manning, and the Bill of Sale was given to secure the balance of the purchase money. I find therefore, as a matter of fact, that Manning was not an agent within the meaning of the Factors' Acts.

It was further contended that if the plaintiff was even entitled to recover for the goods included in the Bill of Sale, he was not so entitled with reference to the after-acquired property.

In Webb's case, goods to the value of 154*l.* 17*s.* 4*d.* were included in the Bill of Sale, and goods to the amount of 123*l.* 11*s.* were after-acquired property. In Pidcock's case 117*l.* 5*s.* was in the Bill of Sale, and 102*l.* 5*s.* after-acquired stock. In Lyon's case, 171*l.* 10*s.* was after-acquired stock. In Jones's case, 31*l.* 14*s.* was in the Bill of Sale, and 44*l.* 5*s.* for goods acquired after.

As to the after-acquired property at common law, such property would not pass so as to entitle the plaintiff to recover either *in trover* or *detinue*; *Lunn v. Thornton*, 1 Com. B. 379; but in equity a different rule prevails, and a contract for the sale of chattels to be afterwards acquired, transfers the beneficial interest in the chattels, as soon as they are acquired, to the vendee. (Benjamin on Sales (2nd edition) p. 65.) The cases of *Holroyd v. Marshall*, (10 H. L. Cas., 191); *Clements v. Matthews*, (11 Q. B. D. 808), and *Belding v. Reed*, (3 H. & C. 955) were fully discussed, and Mr. Jelf drew some ingenious distinctions as to the equitable positions of the plaintiffs and defendants, but I think I am bound by those cases and by the judgment of the Court of Queen's Bench in *Leatham v. Amor*, (47 L. J. Q. B. 581), and the decision of my brother Lopes in *Lazarus v. Andrade*, (5 C. P. Div. 318) in which cases *Belding v. Reed* is fully explained.

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In *Collyer v. Isaacs*, (19 Ch. Div. 342 at 351) JESSEL, M. R. says: "A man can contract to assign property which is to come into existence in the future, and when it has come into existence, equity, treating as done that which ought to be done, fastens upon that property, and the contract to assign thus becomes a complete assignment."

The goods here became specific on being brought on the premises as pointed out in the case of *Clements v. Matthews*; the plaintiff therefore is entitled to the verdict and judgment, in Webb's case for 278*l.* 8*s.* 4*d.*; in Pidcock's case for 219*l.* 10*s.*; in Lyons' case for 171*l.* 10*s.*, and in Jones's case for 75*l.* 19*s.*, to be reduced in each case to one shilling upon the property being given up to the plaintiff.

MATHEW, J.

1884.

February 13.

BRUNSDON v. LOCAL BOARD OF STAINES.

Where a building contract contained a clause that no extras should be paid for unless ordered in writing, and weekly bills delivered for the same, and this had not been done, though extra work had been executed. Held, that the fact that the architect's certificate for the final balance awarded a certain sum in respect of extras, did not entitle the builder to recover beyond the certified sum for extras in respect of which written orders had not been given, nor weekly bills delivered. In an action for damages for breach of agreement to refer disputes to arbitration, the plaintiff can recover only nominal damages if he would not have been entitled to succeed in the arbitration.

THIS was an action brought to recover the sum of 216*l.* 13*s.* 11*d.* under a building contract dated the 16th June, 1880, by which the plaintiff undertook to build for the defendant, a town hall at Staines, upon terms and conditions contained in the contract for the sum of 4797*l.*, and also for damages for the defendant's refusal to refer certain disputes which had arisen thereout between the plaintiff and defendants to arbitration under Clause 20 of the contract. The sum claimed included extra work done by the plaintiff upon the building, and 50*l.* the balance of the contract price. The contract work was finished in July, 1881, and the defendants paid into Court the sum of 50*l.* and one shilling in respect of the claim for damages.

The material parts of the contract were as follows: "The architect may increase or diminish or alter the work without vitiating the contract, but the contractor is not to deviate

from the drawing or specification, or execute any extra work of any kind whatsoever, unless upon the authority of the architect in writing, and a weekly bill in cases of extras and day work is to be delivered to the architect, at latest, during the week following that in which the work may have been done; and the non-delivery of such bill at the proper and stated time will be considered as an abandonment on the part of the contractor of all claim for the amount of such work and as exonerating the Local Board from all liability relative thereto, and only such will be allowed for as day work as may have been authorised by the architect to be so done, and cannot from its character be properly measured and valued.

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BRUNSDON
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Clause 7.—“ The architect is empowered with the consent of the local board to order work in any trade in cases of necessity or emergency, but any addition in or to the work is not to vitiate the contract, but all additions, omissions or variations made in carrying out the works for which a price may not previously have been agreed upon, are to be measured, valued, and certified by the architect, and added to or deducted from the amount of the contract as the case may be,” &c. &c.

Clause 15 provided for a penalty of 10*l.* per week in case of default or delay by the contractor in finishing the works beyond the time specified, and further that the works should not be deemed finished and complete until they should have been certified to be so in writing, by the architect.

Clause 18.—“ A certificate of the architect or an award of the referee hereinafter referred to, as the case may be, showing the final balance due or payable to the contractor, is to be conclusive evidence of the work having been duly completed, and that the contractor is to receive the payment of the final balance, &c., &c.

Clause 20.—“ Provided always, that in case any question, dispute, or difference shall arise between the local board or the architect on their behalf and the contractor, as to what additions (if any) ought in fairness to be made to the amount of the contract by reason of the works being delayed through no fault of the contractor by reason or on account of any requisitions or directions of the architect involving increased cost to the contractor beyond the cost properly attending the

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carrying out of the contract according to the true intent and meaning of the signed drawings and specifications, or as to the works having been duly completed, or as to the construction of these presents, or as to any other matter or thing arising under or out of this contract, except as to the measures left during the progress of the works to the sole decision or requisition of the architect under clauses 1, 9, and 10, or in case the contractor or local board shall be dissatisfied with any certificate of the architect under clause 17, or under the provisions in clause 15, or in case the architect shall withhold or not give any certificate to which the contractor may consider he is entitled, then such question, dispute or difference or such certificate, or the value or measure which should be certified as the case may be, is to be referred to arbitration and final decision of an architect mutually agreed upon, being a Fellow of the Royal Institute of British Architects, and the award of such referee is to be equivalent to a certificate of the architect, and the contractor is to be paid accordingly."

No orders in writing had been given for the extra work claimed for, and no weekly bill sent in nor certificates obtained.

On the 21st December, the architect gave his final certificate in the following words: "The architect reports that the works were completed July 16th, and that Mr. Thomas Brunsdon is entitled to receive the sum of 386*l.* 11*s.* 3*d.* being the final balance due for contract and extra works less the sum of 50*l.* reserved until July 16th, 1882.

(Signed) JOHN JOHNSON,
Architect.

A cheque for 386*l.* 11*s.* 3*d.* was sent by the defendants to the plaintiff in a letter dated the 3rd January, 1883, which the plaintiff accepted on account. The plaintiff had frequently requested the defendants to have the questions in dispute referred to arbitration, but they had always refused.

Wheeler, for the defendants, contended that the objection that written orders had not been given, and weekly bills sent in for these extras, was cured by the final certificate of the architect, which dealt with the extra work. (*Goodyear v.*

Mayor of Weymouth, 35 L. J. C. P. 12.) With the amount of that certificate the plaintiff was dissatisfied, and was entitled to an arbitration under clause 20.

Finlay, Q.C. and W. Wills, for defendants.

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MATHEWS J.—There must be judgment for the defendants. The claim is for extras outside the contract, and it is admitted that the provisions of the contract with respect to extras have not been complied with on two material points. No written orders were given or weekly bills delivered. Mr. Wheeler however contends that he was entitled to an arbitration under Clause 20, and to damages for the defendants' refusal to refer. This Clause provides for reference to arbitration in certain cases. The dispute in question does not come within any of the specified grounds for reference, but it is said that it comes within the general words of the clause.

In some respects the clause is more extensive than is usual in such contracts, but suppose this case is within it, it cannot be assumed that an arbitrator would neglect his duty or give the plaintiff something to which he is clearly not entitled by the contract, nor can the plaintiff therefore recover any damages for a refusal to refer to arbitration when, in my opinion, he would have been entitled to recover nothing under it.

The case of *Goodyear v. The Mayor of Weymouth*, was referred to show that the plaintiff would have been entitled to reopen the question of extras in spite of the non-delivery of the written orders. That case, however, only decides that where the architect's certificate is final and it has dealt with the extras, neither party can afterwards find fault with it. The nominal damages are in my opinion sufficient.

Woodbridge & Sons.

Burton & Co.

STEPHEN, J.

1884.

CASTEL AND LATTA v. TRECHMAN.

February 25.

Under a charter-party providing that the vessel should proceed to Tonapse and Taganrog, or "so near thereunto as she could safely get," and there deliver cargo. Held, these ports being under blockade, that it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt. Held too, the charterers having paid the freight under protest at Constantinople, that the charterers were entitled to recover it back, as, on these facts, there was no implied contract to pay freight *pro rata*.

In this action the plaintiffs, charterers, claimed to recover back from the defendants, shipowners, freight paid under protest under the following circumstances :—

The charter party was entered into on the 9th of April 1877, and provided as follows :—

That the said ship being tight staunch strong and every way fitted for the voyage shall with all convenient speed, sail and proceed to a usual loading berth at Glasgow, or as near thereto as she may safely get, and there load in the usual manner from the factors of the said affreighters about 260 tons bricks, and 20 tons fireclay in bars, about 125 tons handy ironwork including two boilers of 25 cwts., and one boiler of 30 cwts., and 250 tons of pig-iron, in all not less than 655 tons, not exceeding what she can reasonably stow and carry over and above her tackle, provisions and furniture. And having so laden shall proceed with the said ship and cargo, with all convenient speed to Tonapse (Black Sea), with the bricks and clay, Poti with the iron work, and Taganrog with the pig iron in whatever order of ports owners may approve (cargo to be brought to and taken from alongside) or so near thereto as she may safely get and there deliver the same agreeable to bills of lading, and so end the voyage (Restraints of princes and rulers, the dangers of the seas and navigation, fire, pirates and enemies during the said voyage always excepted).

"Freight to be paid at and after the rate of 25s. sterling per ton of 20 cwts. in full of Clyde dues payable in cash on delivery at current rate of exchange."

The ship was duly loaded at Glasgow, and proceeded on her voyage: she arrived at Poti on the evening of May 14th; and was there ready and willing to deliver the portion of the cargo to be there discharged, but owing to the plaintiffs' default in forwarding the bills of lading to Poti, there was no one to take delivery there on their behalf: the ship left Poti on May 17th; on May 5th the Turkish Government pro-

claimed the blockade of all the three ports, Poti, Tonapse and Taganrog; and the time given to a neutral vessel to leave a blockaded port expired on the 17th of May. On the 17th of May the vessel left Poti, and was unable to proceed to Tonapse or Taganrog owing to the blockade. She accordingly proceeded to Constantinople. There the master refused to deliver the cargo save on payment of the full freight. This the charterers declined to pay, but ultimately in order to get possession of the cargo paid the freight under protest and brought this action to recover it back.

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CASTEL
& LATTA
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TRECHMAN.

Murphy, Q.C., and *Edwyn Jones* for the plaintiffs contended that the chartered freight was not payable, inasmuch as the defendants had failed to perform their contract; nor was freight *pro ratâ* payable, inasmuch as there was no new contract, express or implied, to pay the same. They cited *Hopper v. Burness* (L. R. 1 C. P. D. 187), and *Metcalf v. The Britannia Ironworks Co.* (L. R. 2 Q. B. D. 423).

Lockwood, Q.C., and *Edge* contended that, under the circumstances, and having regard to the words in the charter-party "or so near thereunto as she may safely get," the delivery at Constantinople was a sufficient performance of the contract: *Dahl v. Nelson* (L. R. 6 App. Cas. 38); *Duncan v. Köster* (L. R. 4 P. C. 171); *Horsley v. Price* (L. R. 11 Q. B. D. 244). At any rate, on equitable principles, freight *pro ratâ* ought to be paid.

STEPHEN, J.—At Poti the master was ready and willing to deliver the cargo to be there discharged, and the charterers were in default. The shipowners are therefore entitled to be paid the 107*l.* 5*s.* 3*d.*, the freight of the cargo to be delivered at Poti. But with respect to the cargo to be delivered at Tonapse and Taganrog the case is different. I find that there was no time for the vessel to have arrived at either of those ports before the blockade came into operation, even if there had been no delay at Poti. At Constantinople the cargo was given up to the charterers, but only on payment of the freight under protest. But the defendants contend that in going to Constantinople the vessel got as near to Tonapse and Taganrog "as she could safely get," and so they are entitled to the chartered freight. That phrase no doubt meets the case of

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the vessel not being able to get absolutely to the very place or spot or dock stipulated ; but it cannot, in my opinion, enable the vessel to go to any port which, under the circumstances, it is a reasonable course for the master to go to. The authorities are numerous, but I need only refer to the judgments in the recent decision, *Nelson v. Dahl*, in the House of Lords. The claim for the chartered freight therefore fails. The defendants, however, say that they are, at any rate, entitled to freight *pro ratâ itineris*. The case of *Luke v. Lyde* (2 Burr. 882) certainly lends some colour to this contention ; but I feel bound to follow the later authorities of *Hopper v. Burness*, and *Metcalf v. The Britannia Ironworks Co.* In this latter case Lord Coleridge says, "To render freight due it must be shewn either that there has been a presumptive fulfilment of the old contract, or that a new contract between the parties must be implied ;" and Bramwell, L.J., says, "As for the claim for freight *pro ratâ*, that can only be made under a new contract." Now in this case there is no question of a new contract. On the contrary, each party stood out for their strict legal rights. The claim for freight *pro ratâ* therefore fails, and the plaintiffs are entitled to have back the money paid under protest in respect of the cargo consigned to Tonapse and Taganrog.

Lowless & Co.

Turnbull, Tilly, & Mousir.

MATHEW, J.

DUNN v. NEWTON.

1884,

March 4.

The knowledge of the real facts required as the foundation of an election to charge the agent, or the undisclosed principal, must be actual knowledge.

THIS was an action to recover a sum of 957*l.* 3*s.* 7*d.* for work done by the plaintiff as a builder at Edward's Hotel, Hanover Square, for the defendant, the proprietor of the hotel. The work was done on the order, of Middleton & Evans, the managers of the hotel, who had authority from the defendant to order the same to be done. The plaintiff did not know that the defendant was the proprietor till shortly before this action was brought, but the plaintiff's foreman, one Norris, knew that the defendant was the proprietor before the work was commenced.

Muir Mackenzie for the plaintiff.

Morten, for the defendant, contended that the knowledge of Norris was, in law, the knowledge of the plaintiff, and as the plaintiff gave credit to Middleton & Evans, he could not now sue the defendant.

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MATHEW, J.—No. Norris was a foreman. He could take orders, and submit the same to his employer; but no knowledge Norris might have, would affect his employers' rights unless communicated to him.

Oliver Richards.

Barnard & Co.

MATHEW, J.

MOORE v. WALTON.

1884.

March 4.

THIS was an action on a guarantee given to secure a solicitor's bill of costs up to a sum of 200*l*. The bill of costs amounted in fact to over 400*l*. After it had been incurred, the principal debtor became bankrupt, and the bill was delivered to the trustee in bankruptcy, who took no steps to have the same taxed. This action was then brought.

It is not a condition precedent of a solicitor's right to sue a guarantor of costs to be incurred, that the costs should have been taxed.

Willis, Q.C., and *J.J. Sims* for the plaintiff.

Kemp, Q.C., and *Nasmyth*, for the defendant, contended that the taxation of the bill of costs was a condition precedent to the right to sue the guarantor.

MATHEW, J.—The trustee elected not to have the bill taxed, as he might very well do. It is not a condition precedent to the right to sue that the bill should have been taxed; though as a matter of procedure, it may on the hearing be referred if necessary to a Master, to ascertain the amount due, after taxation of the bill.

C. Turner.

Thos. Beard.

GROVE, J.

PAGE & BISHOP *v.* EASTERN & MIDLANDS RAILWAY COMPANY.

1884.

March 6, 7.

Section 91 of the Companies Clauses Act, 1845, prevents auditors from recovering any other remuneration than that fixed upon at a general meeting of the company.

THIS was an action to recover remuneration for work done by the plaintiffs as auditors of the defendant company. The defendants had been appointed auditors on the terms of a resolution of the shareholders of the 5th of October 1878, by which they were appointed auditors of the company at a remuneration of five guineas a year each. Nothing was said definitely prescribing the character of the work to be done by the auditors, and, in fact, for some time after their appointment the plaintiffs only audited the capital account of the company: when required to audit the revenue account also, the plaintiffs refused to do so, unless they received an order from the directors, directing them to audit both the capital and the revenue account; thereupon the directors passed a resolution that the plaintiffs should audit the revenue account. The plaintiffs audited it, and claimed to be paid in respect of it, in addition to the five guineas payable to each of them under the resolution of October 5th 1878. The defendants denied that the plaintiffs were entitled to more than the five guineas each, and paid ten guineas into court. The defendant company's special Act incorporated the Companies Clauses Consolidation Act 1845 (8 & 9 Vict.) c. 16.

Horace Brown, for the plaintiffs relied on *Bill v. The Darent Valley Railway Company*, 1 H. & N. 805, 26 L. J. Ex. 81, as showing that a resolution at a general meeting of the Company was not necessary to entitle the plaintiffs to maintain the action.

R. T. Reid, Q.C., and *C. Haigh* for the defendants. That case is distinguishable, because there the directors had power to appoint a secretary, and the fixing the remuneration was incident to such appointment. But the choice of auditors is expressly confined by sect. 91 of the Companies Clauses Act 1845, to a general meeting of the company.*

* "Except as otherwise provided by the special Act, the following powers of the Company (that is to say), the choice and removal of the directors, except as hereinbefore mentioned, and the in-

Taylor v. Brewer, 1 M. & S. 290, was also cited.

GROVE, J., after stating the facts and saying that it was doubtful whether the communication of the resolution of the directors was intended to bind the company, continued: "But even if it was intended to bind the company, I am of opinion that the company would not be legally liable. To hold that they were, would be to repeal the express provision of section 91. *Bill v. The Darent Valley Railway Company* was relied on for the plaintiffs, but I think that case is distinguishable on the ground mentioned in the argument, viz., that there the directors had the power of appointing the secretary, and the remuneration was fixed as one of the terms of his appointment. In this case, the company alone had the power of appointing auditors; they exercised that power, and at the same time determined the auditors' remuneration. There must be judgment for the defendants."

F. C. Mathews & Browne.

T. M. Wilkin.

MATHEW, J.

MACDONNELL *v.* MARSTON.

1884.

March 12,

THIS was an action to recover damages for the breach of a contract of hiring. The defendant was the proprietor of a newspaper, and in November, 1879, he engaged the plaintiff to canvass for advertisements for the paper upon certain terms, one of such terms being that the agreement should be terminable by a year's notice on either side.

In December, 1881, the defendant joined the firm of Sampson Low & Marston, and took the paper into the

creasing or reducing of their number, where authorised by the special Act, the choice of auditors, the determination as to the remuneration of the directors, auditors, treasurer, and secretary, the determination as to the

amount of money to be borrowed on mortgage, the determination as to the augmentation of capital, and the declaration of dividends, shall be exercised only at a general meeting of the Company."

Only nominal damages are recoverable for breach by the employer of a contract of hiring, if the person hired could have at once obtained other employment of a precisely similar kind which a reasonable man would have accepted.

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v.

MARSTON.

business of that firm. Some correspondence had taken place between the plaintiff and defendant prior to this, (the plaintiff having been informed by the defendant in October, 1881, of his intention to join this firm), with regard to the plaintiff's rights under the contract, he claiming to be entitled to 12 months' notice, whether the paper remained the property of the defendant or not, and the defendant disputing such right. The paper was carried on by the firm, but the defendant remained the editor. Several offers of employment on this paper were made to the plaintiff by the firm of Sampson Low & Marston, which he refused, and ultimately at the end of December, 1881, they offered to employ him upon this paper in the same way and upon precisely the same terms as he had been previously employed upon by the defendant. This he also refused, and brought this action against the defendant. The plaintiff in his evidence admitted that he would have earned as much with the firm as he would have earned with the defendant, but said that he did not care to serve under three masters, and that he had not, during the 12 months subsequent to December, 1881, obtained other employment in lieu of defendant's.

Charles, Q.C., and *Metcalf* for the plaintiff, contended that though the damages must be diminished by the employment he received or might have received, yet the plaintiff was entitled to substantial damages in this action as he was not bound to accept that particular employment.

Finlay, Q.C., and *McCaskie* for the defendant.

MATHEW, J., without deciding whether the defendant's view of the contract as to his right to 12 months' notice under the circumstances was correct or not, held that at any rate only nominal damages were recoverable and gave judgment for the defendant.

Gasquet & Metcalfe. *Taylor, Hoare, Taylor & Son.*

SMITH, J.

ELLIOTT v. DEAN.

1884.

March 19

THIS was an action to recover damages for breach of contract to accept certain bundles of silk sold by the plaintiff to the defendant. It was tried before Mr. Justice Smith and a S. J. at the Nottingham Winter Assizes in 1884. The jury found that a contract was in fact made, and his lordship reserved for further consideration in London, the question whether there was a note or memorandum of the bargain in writing sufficient to satisfy s. 17 of the Statute of Frauds.

On July 17, 1882, the defendant wrote to the plaintiff the following letter.

*" July 17, 1882.**" MR. ELLIOTT.*

"SIR,—Owing to the warehouse stopping our machines, the stuff you have on order, will not be wanted. Therefore I am sorry to say that I must cancel all orders you have got down for me.

" Sir, I remain yours, JAMES DEAN."

On July 27th, the defendant wrote to the plaintiff as follows:—

*" July 27, 1882.**" MR. ELLIOTT,*

"SIR,—I return invoice that you sent us. I must also inform you that it is no use now. We have cancelled the order, and I shall be surprised if you persist in sending either the spun, or the invoice again, for we shall not have it under any circumstances whatever.

" Sir, I remain yours, J. DEAN."

The enclosed invoice contained all the terms of the contract proved, save that the contract proved was of a sale of 44 bundles of silk, while the invoice specified the quantity as 455lbs. 8oz. Evidence had been given at the trial that a bundle of silk contained about 10lbs.

A letter signed by the defendant cancelling a contract and referring to an enclosed invoice which contained all the terms of the contract. Held, a sufficient note or memorandum of the bargain signed by the party to be charged within the meaning of the 17th Sec. of the Statute of Frauds.

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ELLIOTT

v.
DEAN.

Morten for the plaintiff:—The requirements of the Statute of Frauds are satisfied. *Wilkinson v. Evans*, L. R. 1 C. P. 407; *Bailey v. Sweeting*, 9 C. P. N. S. 848; 30 L. J. C. P. 154; *Cave v. Hastings*, L. R. 7 Q. B. D. 125.

Meller, Q.C., and *Stanger*, for the defendant:—The letters shew that the defendant had put an end to the contract, and the note or memorandum must be made and signed whilst the contract is still recognized by both parties as subsisting. Further, there is a variance between the contract proved, and the invoice; for 44 bundles would make 440lbs., not 455lbs. 8oz. They cited *McMullen v. Helbery*, 6 L. R. C. L. Irish, 468, and *Hopton v. McCarthy*, 10 L. R. C. L. Irish, 266.

SMITH, J., (after stating the facts and reading the documents above set out) continued:—If the letter of July 27th had stopped at the words “no use now,” the case would clearly have fallen within *Wilkinson v. Evans*, where the defendants gave their reason for refusing the cheeses. But the letter goes on to say, “We have cancelled the order.” Upon this, it is argued, that the memorandum is insufficient because it shows that the defendant no longer regards the contract as an existing one, but I do not think this makes any difference. The true test is: Does the defendant by his writing recognize and adopt the writing as embodying the terms which the parties had previously agreed upon; and *Bailey v. Sweeting* strongly supports this view.

As to the alleged variance between 44 bundles and 455lbs. 8oz., no point was made of this at the trial or I should have asked the jury whether 40 bundles might not have been worked out as 455lbs. 8oz.; and it is to be observed that the defendant in his letter of the 27th of July, never objected to the quantity specified in the invoice. There must be judgment for the plaintiff.

H. L. Swift.

W. A. Richards.

HUDDLESTON, B.

TYLER AND WITT *v.* LONDON AND SOUTH
WESTERN RAILWAY COMPANY.

1884.

March 19.

THIS was an action to recover damages for the conversion of a thrashing machine under the following circumstances :—

On the 14th October, 1882, Witt, (who had seized the machine on that day from one Utting, and claimed to be entitled to it under a bill of sale from Utting to him, dated the 21st April, 1882, but which had not been registered), delivered the thrashing machine to the defendant company to be by them conveyed to Maidenhead and delivered to Tyler, who, it was alleged, had purchased the machine from Witt on the 17th October, 1882.

Utting had granted another bill of sale covering the machine in question to one Brown, which was duly registered on the 13th October, 1882.

Upon the seizure of the machine by Witt, Utting obtained a warrant duly signed by a Justice of the Peace, for the apprehension of Witt upon a charge of stealing the machine, and on the 19th October, 1882, the machine was seized at Reading on its way to Maidenhead by a police constable acting under this warrant, and was re-consigned to Andover by the police constable in his own name.

On the 20th of October Witt and Tyler both saw the station master at Andover station, and warned him not to hand over the machine to the police constable, as it was the property of one or other of them, but the station master replied that the machine was consigned to the police constable and would be handed over to him. On its arrival at Andover, the machine was accordingly handed over to the police constable and taken possession of by him. Witt was on the 27th October, 1882, discharged, the prosecution against him having failed, but the machine had been returned by the police to Utting, and this action was thereupon commenced.

At the close of the plaintiff's case, *Petheram, Q.C.*, (with him *Arbuthnot*) for the defendant, submitted that there was no case to go to the jury, as (1) The property in the thrashing

The police have power under a warrant for the arrest of a person charged with stealing goods, to take possession of the goods for the purposes of a prosecution. A person therefore is justified in refusing to hand over goods to one claiming to be the owner, if such person has been entrusted with them by the police, who have taken possession of them under such circumstances.

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 TYLER & WITT
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 COMPANY.

machine was not in Witt at the time of the alleged conversion, as the bill of sale under which he claimed became inoperative when the second bill of sale was registered (*Connelly v. Steer*, 50 L. J. Q. B. 926, L. R. 7, Q. B. D. 520), and if Witt had no title, neither could Tyler, who claimed under him, have any. The defendants were entitled to rely on the *jus tertii* as against him, *Sheridan v. The New Quay Company*, 4 C. B. N. S. 618. (2) The police were empowered to seize the goods under the warrant of arrest, and the defendants had been guilty of no conversion in delivering the machine to the constable.

Candy (Garth with him), for the plaintiff, contended that Witt was lawfully in possession of the machine as between himself and Utting at the date of the delivery to the defendants, and that they had no right to deliver the machine to the police constable, and that, at any rate as regards Tyler, the defendants were estopped from setting up a third person's title as against him from their position as bailees.

HUDDLESTON, B.—I think there is no case to go to the jury. The defendants seem to me to be right in their contention as to the effect of the registration of the second bill of sale from Utting to Brown. I am also prepared to hold that police constables have the power to take possession of goods for the purposes of a prosecution under a personal warrant of arrest, and do not require a distress warrant for that purpose. It is admitted that this machine was in the hands of the police at the time of the alleged conversion. It seems to me, therefore, that it was in *custodia legis*. I give judgment for the defendant.

Speechley Mumford & Landon.

Bircham & Co.

The action was originally framed for breach of contract to carry, with an alternative claim for damages for conversion, but the claim for breach of contract was abandoned at the trial, and the claim for damages alone relied on. The defendants also relied on an alteration in the bill of sale from Utting to Witt after execution, which in the opinion of the learned Judge, was a material one, but the case was not decided on this ground.

MATHEW, J.

ISAACS v. HARDY.

1884.
March 24.

THIS was an action by a picture dealer against an artist for damages for breach of contract to paint and deliver to the plaintiff a picture of a given subject at an agreed price. The defendant painted the picture as agreed; the plaintiff going to see the work in progress from time to time, and sending a frame for it to the defendant's studio, into which the defendant placed it.

A contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price, is a contract for the sale of a chattel.

The contract was not in writing, and there was no note or memorandum thereof sufficient to satisfy Sect. 17 of the Statute of Frauds.

Pollard, for the plaintiff, relied on *Clay v. Yates* (1 H. & N. 73; 25 L. J. Ex. 237), and particularly on the illustration put by Martin, B., in the argument, as showing that the Statute of Frauds did not apply to the case.

Tyser, for the defendant, relied on *Lee v. Griffin*, 1 B. & S. 272; 30 L. J. Q. B. 252.

MATHEW, J.—Such a defence never appears to have been raised by an artist before, but I am of opinion that the non-compliance with the Statute of Frauds is an answer to the action.

*Lumley & Lumley.**C. B. Hodgson.*

See the cases on the distinction between "sales" and "work and labour done and materials furnished," collected in Benjamin on Sales, pp. 75—87 (2nd Edition), who states the principle deducible from them as follows:—"If the contract is intended to result in transferring for a price from B. to A. a chattel in which A. had no previous property, it is a contract for the sale of a chattel."

MATHEW, J., and a C. J.

NIELSEN & SON v. NEAME & CO.

1884.

April 3.

Timber was consigned to the Surrey Commercial Docks under a charterparty, by which freight was made payable "for deals and battens per St. Petersburg standard hundred £2 5s." Held, that freight was payable only upon the number of St. Petersburg standard hundreds, as ascertained by the customary mode of measurement adopted by the dock Company for timber cargoes.

THIS was an action by ship owners against the consignees of cargo to recover an alleged balance of freight in respect of a cargo of deals and timbers consisting of 15,065 pieces shipped under a charterparty at Uleaborg in Sweden for delivery at the Surrey Commercial Docks in the Port of London. Freight was made payable by the charterparty as follows:—

"For deals ^{and} _{or} battens per St. Petersburg standard hundred 2l. 5s."

The cargo was duly delivered and freight paid according to the landing returns of the Dock Company on 404·28 St. Petersburg standard hundreds; the plaintiffs however claimed to be paid freight on 431·78 St. Petersburg standard hundreds, or 27 standards more, and brought this action for the freight due on the excess.

A St. Petersburg standard hundred means 120 pieces of wood 12ft. in length by 1½ inches thick by 11 inches wide. This gives a cubical capacity of 165 cubic feet solid wood.

The mode of measurement adopted in this case by the dock company was as follows. There are certain recognized sizes of deals and other timbers in the timber trade, but from irregularity in sawing, individual pieces of timber are frequently larger or smaller than the recognized size to which they are supposed to be cut.

The specification which accompanied the bill of lading, specified the number of pieces of each size comprised in the cargo. In discharging the ship, the dock company counted the pieces and classed them in the various recognized sizes. In doing this, they disregarded the fractional differences over or under the recognized sizes. The number of pieces of timber of each size comprising a St. Petersburg standard hundred is well known, and the total quantity of timber in the cargo was divided into St. Petersburg standard hundreds, the number working out at 404·28 of these standards, and upon this number the defendants had paid freight.

The plaintiffs however contended that the following mode of measurement should have been adopted. After the timber had been placed in the usual piles on the dock company's premises, the plaintiffs caused it to be measured by taking the length, width and height of the piles, which being multiplied together gave the cubical contents of the timber in piles; This equalled the cubical contents of 431·78 St. Petersburg standard hundreds, or 27 standards more than was given by the dock company's mode of measurement. Upon this excess the plaintiffs claimed freight.

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Lockwood, Q.C., and Edge, for the plaintiffs.

Finlay, Q.C., and Gye, for the defendants.

The plaintiffs called certain of the dock company's officials, who proved that the mode of measurement adopted in this case was that in use by them for the purposes of their landing returns, and that it was customary in the trade to pay freight according to such returns as furnished to the consignee.

MATHEW, J., thereupon gave judgment for the defendants.

Turnbull, Tilby, & Mousir. Druces, Jackson, & Attlee.

HUDDLESTON, B.

1884.

April 3.

LOCKWOOD v. THE TUNBRIDGE WELLS LOCAL BOARD.

THIS was an action for work and labour done, and goods sold. The claim was admitted, but the defendants counter-claimed for the price of stone sold by them to the plaintiff, and the question was whether the defendants were entitled to recover for the price of this stone.

The plaintiff was a builder who had contracted to execute certain works for the defendants at Pembury. The defendants were the owners of a stone quarry, and they agreed to supply to the plaintiff the stone required in the carrying out of the

A. contracted with B. to supply him with the whole of the Sevenoaks stone required at the Pembury reservoir, the same to be delivered into trucks of the railway company at Sevenoaks at 5s. 3d. per ton. Held that A. was entitled to payment on delivery for the quantities delivered from time to time.

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works, on the terms contained in the following letter written by the plaintiff to the defendants.

"I hereby beg to confirm my contract with you to supply me with the whole of the Sevenoaks stone required at the Pembury reservoir, the same to be clean, fit for use, and delivered into trucks of the railway company at Sevenoaks at 5s. 8d. per ton."

Deliveries were made under this contract from time to time, and at the time this action was brought about one-third of the quantity of stone required for the construction of the reservoir had been delivered to the plaintiff, and the question was whether the defendants were entitled to be paid for this, or whether their right to payment for any of the stone delivered, did not arise until delivery of the whole amount required.

Henn Collins, Q.C., and *Heywood*, for the plaintiff.
Cohen, Q.C., and *M. Lush*, for the defendants.

The following cases were cited:—*Oxendale v. Wetherall*, 9 B. & C. 386; *Roberts v. Havelock*, 3 B. & Ad. 404; *Waddington v. Oliver*, 2 B. & B., N. R. 61; *Withers v. Reynolds*, 2 B. & Ad. 882; *Sinclair v. Bowes*, 9 B. & C. 92; *Hart v. Mills*, 15 M. & W. 85; *Appleby v. Myers*, L. R. 2 C. P. 651.

HUDDLESTON, B.—The question is, when was payment to be made for the stone delivered from time to time under the contract. Mr. Collins contends that the contract was one entire contract, and that payment under it did not become due until its completion. Mr. Cohen says that payment was to be made on each successive delivery for the amount delivered.

Several cases were cited, and the law bearing on the subject is fully discussed in the notes to *Cutter v. Powell*, in 2 Smith's Leading Cases, but the question really turns upon the intention of the parties, as shown by their agreement. Now the plaintiff was a contractor, and I am satisfied that the intention was that the price of the stone should be set off against the amount of the certificate. The quantity of stone required was not specified, and was to a certain extent uncertain. In my opinion the property in the successive deliveries of stone

passed to the plaintiff, on delivery into the railway trucks, and on him would have fallen the loss, if anything had afterwards happened to it. On the property passing, the defendants became entitled to payment. There must be judgment for the defendants.

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Chester, Mayhew, Broome, & Griffiths.

Sole, Turner, & Knight.

HAWKINS, J., and a S. J.

CONNERY v. BEST, SAXBY, & CO.

1884.
April 8.

THIS was an action for breach of an agreement on the part of the defendants to take the plaintiff into partnership with them as a firm of timber merchants. The defence was that there was no concluded agreement. The defendants were starting in business as timber merchants on the 1st of December, 1880. Prior to this negotiations had taken place between the plaintiff and the defendants, which resulted in the following letters:—

A. and B. agreed to take C. into partnership at a future date, the agreement required by both sides to be drawn up by solicitors. The parties had not considered, and could not afterwards agree upon several terms of the intended partnership. Held, that there was no concluded agreement between the parties.

"19th October, 1880.

"J. C. BEST, Esq., Brixton,

"DEAR SIR,

"Referring to my conversation respecting my engagement with you, I beg to submit the following:—1st years' salary to be 150*l.*; 2nd 175*l.*; 3rd 200*l.*; and at the expiration of the 3rd year, and on entering the 4th, to be taken into partnership by you at a division of one-sixth of the total profits of the year. Should the division of one-sixth of the total profits of the year not amount to 200*l.*, that sum to be made up to me by you. I am fully prepared to devote my whole and entire time to the working of the business, and that my agreement with you is to be optional for 7, 14, or 21 years, and to date from the 1st of January, 1881.

"Waiting favour of your early reply.

"Yours faithfully,

"T. CONNERY."

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"12th November, 1880.

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& CO.

"DEAR CONNERY,

"Referring to yours of the 19th Ult., I have seen my partner, Mr. J. Saxby, who, with myself, have agreed to the terms contained in your letter, and I have instructed Messrs. Smith, Stenning, & Croft, of Aldermanbury, our solicitors, to draw up such agreement required by both sides.

"I remain, dear Connery,

"Yours faithfully,

(Signed) "J. C. BEST, for self and partner."

One or two draft agreements were accordingly prepared, but the parties were unable to finally agree upon the plaintiff's right, when he should become a partner, to accept bills and draw cheques in the name of the firm, and to purchase timber without the consent or authority of the other partners. The parties were also not agreed as to the effect of the death of the defendants or either of them upon the partnership after its formation. The plaintiff alleged that on their disagreement it had been arranged among them that the final settlement of the terms of partnership should be postponed till the end of his third year's service, but this the defendants denied.

The plaintiff entered the defendants' service, and remained with them for the three years, but they refused to take him into partnership.

Jelf, Q.C., and H. D. Greene, for the plaintiff.

E. Clarke, Q.C., and Stroud, for the defendants, cited Hussey v. Horne Payne, L. R. 4 App. Cas. 311; Chinnock v. Marchioness of Ely, 4 De G. J. & S. 688.

HAWKINS, J., held that there was never any concluded agreement to take the plaintiff into partnership, and nonsuited the plaintiff.

Peacock & Goddard.

Stenning & Croft.

DAY, J. (Fur. Con.)

GAYNER AND OTHERS v. THE SUNDERLAND
JOINT STOCK PREMIUM ASSOCIATION.

1884.

April 8.

THIS was an action brought by the plaintiffs, the owners of the barque *Foxglove*, to recover 300*l.* upon a policy of insurance, dated the 8th August, 1883, upon freight from Sunderland to Valparaiso. The material words of the policy were as follows: "On goods or freight from the loading thereof, on board the said ship at Sunderland (in port) . . . until the said ship or vessel shall have arrived at Valparaiso, and port or ports on the West Coast of South America." Freight was declared on and valued therein at 1,200*l.* At the date of the policy the plaintiffs had shipped at Sunderland on their own account a cargo of coals on the *Foxglove* for exportation to Valparaiso. After the effecting of the policy and while still in port with the coals on board waiting to proceed on her voyage, she was run down by the *Acacia* who was alone to blame, and her cargo wetted, in consequence of which it had to be discharged and could not be shipped again, and it was admitted by the defendant that that particular adventure had been properly determined. The *Foxglove* was detained at Sunderland for repairs in consequence of the collision for some 6 weeks, and all expenses of repairs and demurrage were paid by the owners of the *Acacia*, who also when the *Foxglove* was again ready to put to sea offered to put on board free of expense a similar cargo of coals for Valparaiso. This, however, the plaintiff refused, and on the 26th of September the *Foxglove* sailed with a cargo of coals for Algoa Bay at 26*s.* 6*d.* per ton freight. They claimed to be entitled to recover from the underwriters as for a total loss of freight on the insured voyage.

The following questions were left to the jury by the learned judge at the trial at Durham on the 24th January, 1884.

(1) Could a reasonably prudent uninsured shipowner have sustained any actual loss of freight by reason of the collision?

Answer. No.

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A shipowner shipped goods of his own on his own ship, for a particular voyage from Sunderland to Valparaiso, and effected a policy of insurance on "freight." The ship was run into and damaged at the port of loading, with the goods on board, after the policy had attached, whereby the cargo was so damaged that it had to be unloaded, and the particular adventure was frustrated. The ship was detained in port some six weeks, and all expenses of repairs and demurrage were paid by the owners of the colliding ship. When again in a sea-going condition, she was offered a similar cargo to the same port. This the shipowner refused, and sailed with another cargo elsewhere. Held, that the shipowner could recover nothing on the policy, inasmuch as the salvage was, or might have been, equivalent to the freight insured.

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(2) Might the plaintiffs have had put on board just as soon as the Algoa Bay cargo, a cargo similar to that which was damaged, free of cost and expense?

Answer. Yes.

(8) Was the charter to Algoa Bay a reasonable course under the circumstances as between the plaintiff and the underwriters of freight.

Answer. We consider the underwriters not responsible.

Upon these findings the case was reserved for further consideration.

Waddy, Q.C., and *Warr*, for the plaintiff.

A contract of marine insurance is not a contract of indemnity, *Aitchison v. Lohre*, 4 App. Cas. 755. There has been no salvage of freight here. It has been earned on a totally distinct voyage, *Barber v. Fleming*, L. R. 5 Q. B. 66; Phillips on Insurance, 3rd edit. Vol. 2, p. 204; Parsons on Insurance, Vol. 2, 167; Story on Agency, Vol. 1, p. 943; *Everth v. Smith*, 2 M. & S. 278. An underwriter has no right in such a case to suggest what ought to be done to lighten his loss. *Lord v. Neptune Insurance Company*, 10 Gray's Rep.: Massachusetts. The adventure contemplated in the policy came to an end. It was an insurance on an earmarked cargo. Everything was done under the sue and labour clause to minimise the loss.

A. Wills, Q.C., and *Edge*, for defendant.

Green v. Royal Exchange Insurance Company, 6 Taunton, p. 60, decided the point in defendant's favour in 1815, and has been acted on ever since. The propositions cited from Phillips and Parsons assume that if the ship *can* earn any thing for salvage, she must. The underwriters are entitled to be treated fairly. There is no case in either English or American law which conflicts with the view now contended for. The dictum in *Barber v. Fleming* only means that where the vessel reasonably proceeds on another voyage, the freight earned cannot be treated as salvage.

DAY, J.—This is a case of great importance and appears to be one of novelty. There is practically no dispute as to the facts. The *Foxglove* was about to sail on a voyage to

Valparaiso for the benefit of the shipowner, and was run into by the *Acacia* under circumstances making that ship alone responsible. The *Foxglove* was compelled to unload her cargo and undergo repairs, and that particular adventure became wholly abortive, but in 4 or 5 weeks all the repairs were done, and full compensation was paid by the owners of the *Acacia* to the owner of the *Foxglove* for the damage done to that ship, and demurrage both for her detention for repairs and for the time spent in loading a fresh cargo. No allowance was however made by the Average Stater in adjusting the claim of the *Foxglove* against the *Acacia* for loss of freight. Now the shipowner might have employed his ship variously. He was offered by the owners of the *Acacia* a cargo of coal free of expense on board for Valparaiso; but for some reason or another, probably because he thought he would have a better chance of recovering from the underwriters, he refused this offer and took a cargo of coals for Algoa Bay. Looking at the 1st and 2nd findings of the jury, it is not surprising that the owners of the *Acacia* paid no compensation for loss of freight to the *Foxglove*, though they were liable to make good to her every penny of the damage she had actually sustained. She could have procured another similar freight without a moment's delay, and no damage could therefore be recovered against the *Acacia* in respect of loss of freight. Are the plaintiffs entitled then to recover for this freight under this policy of insurance?

Freight, as I understand it, is the value of the use of the ship. The plaintiff says he has lost this. In one sense he has; he would have lost this specific freight under a charter-party, if there had been one. He has utterly lost the benefit of that specific contract, so to speak, but he has had the use and value of his ship.

That is salvage in my view. That contract only fixed the value for that particular voyage. He has had the value of his ship for the large proportion of the time, and that is salvage out of the loss. If you use freight in one sense he has lost it, but not in another. If he has had the benefit of salvage, he must account for it, and the jury have found practically that he has sustained no loss at all; he has saved the equivalent. It seems to me, therefore, that he is not entitled to recover against the underwriters in this action. He has no

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claim at all in respect of this against the person who caused the loss, and freight cannot be taken in two senses, one as between the wrong-doer and the ship, and another as between the insurer and the insured. The findings of the jury are fatal to the plaintiff in this case. I cannot believe that it rests with the insured to say, by substituting one voyage for another, that he will deprive the underwriter of the benefit of salvage. The jury are bound in each case to take into consideration all the circumstances, and they must say what is the salvage. What value is the ship to the owner for the surplus time left to him? It seems to me that the underwriters are, in accordance with every principle of insurance law, entitled to the benefit of salvage, and the assured only to be recouped the amount of loss he has actually sustained, which in this case was nil. The verdict must therefore be entered for the defendants with costs.

Field, Roscoe & Co.

Maples, Teasdale & Co.

LOPES, J.

THE SOCIÉTÉ GÉNÉRALE DE PARIS v. THE
 TRAMWAYS UNION COMPANY, JAMES MONT-
 GOMERY WALKER, JANET WALKER, WILLIAM
 STUART WALKER, AND FREDERICK RAMSAY
 WALKER.

1884.

January 18.

A share in a joint stock Company is a chose in action. As between two holders of blank transfers of such shares, the one who first gives notice of his title to the Company is entitled to priority.

THE question in this action was whether the plaintiffs or the defendants, Janet Walker, William Stuart Walker, and Frederick Ramsay Walker (as the executors of one James Scott Walker) were entitled to 100 fully paid-up shares in the Tramways Union Company, of which the defendant James Montgomery Walker, had been the registered owner.

On March 9th, 1881, J. M. Walker deposited the certificates of the shares in question with J. S. Walker, and at the same time executed and delivered to J. S. Walker a blank transfer of the same. This was done by way of security for moneys owing from J. M. Walker to J. S. Walker, and on terms entitling J. S. Walker in certain events (which happened) to sell the same for his own benefit.

J. S. Walker died on the 18th of February, 1882.

On the 15th of December, 1882, J. M. Walker executed blank transfers of the shares in question to the plaintiffs for valuable consideration, and the plaintiffs shortly afterwards gave notice to the Tramways Company of their title.

The executors alleged that they had given notice of their title before the plaintiffs, but his Lordship found that the plaintiffs' notice was first given.

Finlay, Q.C., and *Solomon*, for the plaintiffs.

Cohen, Q.C., and *B. B. Rogers*, for the defendants, contended that the doctrine that as between two equitable titles, notice gives priority only applied where, by the giving of the notice, the party giving it had done all that the nature of the case enabled him to do towards obtaining a perfect title, and that it did not apply where, as in the present case, it was possible to obtain a perfect legal title by a proper legal transfer of the shares by a deed properly executed.

The following cases were cited:—*Cummins v. Prescott*, 2 Y. & C. (Ex.), 288; *Phillips v. Phillips*, 4 De G. F. & J. 208; *Shropshire Union Railways and Canal Co. v. The Queen, and Robson*, 7 E. & L. App. 496; *Ex parte Union Bank of Manchester*, L. R. 12, Eq. 354; *Rice v. Rice*, 2 Dr., 76-8, and *Lindley on Partnership*, vol. 1, p. 663.

LORES, J.—The transfers upon which the plaintiffs and defendants respectively rely, were not re-delivered after the blanks were filled in. Such transfers are therefore inoperative as deeds, and neither the plaintiffs nor defendants have any legal title to the shares in dispute in this action. Reliance can therefore only be placed on the equitable interests which the parties claiming these shares have acquired. The defendants' equitable title is prior in point of time to the equitable title of the plaintiffs, and, *ceteris paribus*, or in other words, the equities being equal, would prevail.

The plaintiffs, however, contend that they gave a notice of their interest to the company before the defendants, and for that reason their equitable title is to be preferred. The defendants contend that a share is not a chose in action, and is therefore unaffected by notice. And also that they gave the first notice.

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The notice relied on by the defendants is a notice given after the funeral of James Scott Walker when a paragraph of the agreement was read in the presence of the secretary of the Tramways Company who was attending as a relative to hear the will read.

I am clearly of opinion that the reading upon that occasion this paragraph of the agreement, which stated the terms on which the certificates had been deposited with, and the blank transfers executed and delivered to James Scott Walker, would not effect the secretary with knowledge or notice; it was not read for that purpose, and cannot be regarded as a notice to the company.

The plaintiffs therefore gave the first notice to the company of their equitable interest, and if a share is a chose in action, it seems clear the plaintiffs' equity must prevail.

I am of opinion that a share is a chose in action. No doubt on the subject seems to be entertained by Lord Justice Lindley, who, at p. 663 of his first volume on Partnership, says:—

“Shares in companies governed by modern statutes are not, however, mere choses in action; the legal as well as the equitable interest in them is capable of transfer, and when the legal ownership in them, or even only the legal right to be registered, is acquired by a *bond fide* purchaser for value without notice of a prior equitable interest, the title of such purchaser cannot be impeached.

“At the same time, if a share is equitably assigned or mortgaged more than once, the priority of the assignees or mortgagees will be determined, *ceteris paribus*, not by the priority of the assignments or mortgages, but by the priority of the notices thereof given to the company, and, as will be seen hereafter, notice to the company is necessary to prevent a share registered in the name of its assignee from being treated in bankruptcy as in his order and disposition.”

It was admitted by the defendants, and there is abundance of authority to that effect, that notice had the effect of taking a share out of the order and disposition of the assignor as against a trustee in bankruptcy. I am at a loss to see why a notice should not have the same effect as between successive incumbrancers.

It was also contended by the plaintiffs and defendants that the equitable rights acquired by them respectively had not

been asserted with reasonable diligence, and could not be enforced. It is, however, unnecessary for me to express an opinion on this subject holding as I have on the other questions raised in this case.

There will be a judgment for the plaintiffs with a declaration that the plaintiffs are entitled to the shares; the certificates, and transfers in blank to be delivered up to the plaintiffs.

M. Abrahams & Roffey.

Miller, Smith & Bell.

See notes to *Ryall v. Rowles*, 2 White & Tudor's *Leading Cases in Equity*, p. 729 (5th Edition).

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WILLIAMS, J.

THE LEA CONSERVANCY BOARD v. THE MAYOR,
&c., OF HERTFORD & OTHERS.

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March 22.

THE facts and arguments fully appear in the judgment.

Bidder, Q.C., Edward Clarke, Q.C., and Dryden, for the plaintiffs.

Sir Farrer Herschell, S. G., Webster, Q.C., W. Graham, and *Moulton*, for the different defendants.

WILLIAMS, J.—This was an action brought in order to obtain an injunction to restrain the defendants from causing or permitting any of the sewage from the town of Hertford to flow into the River Lea, and from causing or permitting any water containing any impure or foreign matter, whether in solution or not, to flow from the sewage works into the river. And also for damages for the injury done by the pollution of the river, and the deposit and accumulation therein of mud from the sewage.

The case is not the simple one of a complaint by riparian owners of an injury done to their stream by the creation of a

A public body was authorized by Act of Parliament to construct and maintain a system of sewers and drains, and was enabled by compulsory purchase to obtain the necessary lands for the erection of works in a specified spot for the purification of the sewage, and for the conveyance of the effluent sewage water along a specified course, terminating in a specified spot; the public body was also prohibited from allowing the sewage to be discharged into a

river until after it had been subjected to a process of purification prescribed by the Act. Held, that so long as the public body complied with the requirements of the Act, they were not liable to an action for a nuisance in discharging the effluent into the river at the authorized place.

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nuisance by fouling and pollution. The rights and obligations of the parties to this action in relation to each other, are to a large extent, regulated by local statutes. One effect of these statutes is to greatly narrow and control some of the questions determinable between the parties in an action at law. For example, it is not directly open to inquiry in this action whether the process in use at Hertford for the purification of the sewage is the best process, or even a good process, nor whether it could be advantageously supplemented, and made more perfect in its action, by its combination with other processes, nor whether chemical precipitation processes can be made effective for the thorough purification of sewage without the aid of some system of land irrigation or filtration. I think it will appear that none of these important and even vital questions can be more than collaterally touched upon in this action.

In the year 1854, Parliament passed the New River Company's (Hertford Sewage Diversion) Act, 1854. That Act recited, that it was expedient that the Company should be enabled to provide more effectually against the deterioration of the waters supplying the New River, by the construction of intercepting sewers and other works near the town of Hertford. The Act incorporated the Lands Clauses Act, and portions of the Waterworks Clauses Act, and authorised the Company to construct and maintain a system of sewers and drains, all uniting in one main sewer at the east end of the town, and enabled them by compulsory purchase to obtain the necessary lands for the erection of works in a specified spot for the purification of the sewage, and for the conveyance of the effluent sewage water along a specified course, terminating in the Manifold ditch, at a point about 50 yards from its entrance into the Lea. The Act also (Section 28) authorised all residents in Hertford to drain their houses and premises into the sewers, and also (Section 29) empowered the Company to enter upon any house and premises and collect and intercept the sewage water discharging into the Lea, or other streams leading into the Lea, and divert it into the new sewers; and the Act also (Section 30) imposed a penalty upon any person, after the completion of the new sewers, continuing to use any sewer then discharging its sewage into the Lea, or making a new one. The 8th and 9th

sections contain the most important provisions. Section 8 is in these words: "That the Company shall not at any time discharge or permit any sewage or sewage water to flow from any of the said sewers immediately or mediately into any part of the River Lea until after it has been subjected to the process of purification known as Higgs' patent process, or some other process which from time to time may be in use as the best then known practicable process for the purification thereof." Section 9 is in these words: "That if any question shall arise between the Company and any of the parties interested in the waters of the river, as to the *bond fide* compliance with this provision, the parties in difference, or either of them, may refer the question to the Board of Trade, and that Board may make such inquiries thereon as it thinks fit, and may declare what in its opinion is the best then known practicable process for such purification, and every such declaration shall for the purposes of this Act, be conclusive as to what is the best then known practicable process." Upon the passing of this Act the New River Company proceeded to execute the works above referred to. They connected the whole system with one main sewer at the east end of the town, and there they erected works consisting of sheds and tanks for the purpose of subjecting the sewage to Higgs' process of purification. From these works they constructed an open cutting known as the straight cut, running for about three-quarters of a mile from the works, in a straight line down the meadows, passing, by means of a double iron culvert, under the New River, and down to the Manifold ditch, below the tumbling bay. This straight cutting was for the greater part of its course lined with a semi-circular brick invert. These works were completed in 1856, and from that time to 1868 the New River Company continued to receive the Hertford sewage into their sewage works, where it was duly treated according to Higgs' process, and then discharged from the works into the open straight cut along which it flowed into the Manifold ditch, and ultimately into the Lea, into the sluggish water below Ware Lock.

Higgs' process, it may be mentioned, was that known as the lime process, and it was worked by the New River Company by means of two long tanks, each over 100 feet long

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and 20 feet wide; in these the sewage was defœcated and clarified by the simple process of decomposition and precipitation without the aid of filtration, the effluent being afterwards exposed to the open air in the straight cut for three-quarters of a mile before falling over the tumbling bay into the Manifold ditch.

Up to 1868 the River Lea was managed by a body of trustees, acting under several Acts of Parliament, but in that year an Act called the Lea Conservancy Act, 1868, was passed to make better provision for the preservation and improvement of the River Lea. This Act, after reciting that a large proportion of the water supplied to the metropolis was drawn from the Lea, and that the Lea was extensively used for purposes of navigation, and that for these and other reasons, the preservation of the purity of the water of the Lea, and the improvement of the stream, were objects of great public and local importance, and that there was not any existing authority with sufficient powers for effecting such preservation and improvement, proceeded to create a new body corporate, under the name of "The Lea Conservancy Board" for carrying the Act into execution, and by Section 62 all the rights, powers, and jurisdictions of the former trustees were transferred to the Board. A series of clauses, from 89 to 100, under the head of "Protection of Water," then follow. Section 89 enacts that "The Board may by all lawful and proper means preserve and maintain at all times, as far as may be, the purity of the water of the Lea." Section 91 forbids "any person under a penalty of 100*l.* to cause any sewage or other offensive or injurious matter to flow or pass into the Lea through any sewer or channel not used for that purpose before the establishment of the Board." Section 22 enacts "That where, after the establishment of the Conservancy Board, sewage or other offensive or injurious matter is caused or suffered to flow into the Lea, then (whether such matter had been so caused or suffered to flow before the establishment of the Board or not), the Board within a reasonable time after knowledge of the fact, shall give notice in writing under their common seal to the person causing or suffering the same to flow to the effect that they require him to discontinue the flow thereof, as aforesaid, within a time to be specified in the notice not being in any case less than one

year, or more than three years; but the Board may from time to time extend the time." Section 93 enacts that any person to whom such notice is given, shall notwithstanding anything in any other Act, discontinue the flow within the time allowed, and failing to do so shall be guilty of a misdemeanour, and liable, on summary conviction, to a penalty of 100*l.*, and a further penalty of 50*l.* a day, and power is given to the Board to stop up the sewer or channel in question. Section 94 enables a person aggrieved by reason of the insufficiency of the time allowed to demand a further time, and in case of refusal to appeal to the Secretary of State, or the Board of Trade, as the case may be. Section 100 enacted that nothing in that Act should legalise or permit a nuisance, or take away, or prejudicially affect any remedy or right which the Conservancy Board, or any person would or might have had if that Act had not been passed as against any person causing the flow of sewage, or other offensive or injurious matter.

The Act then, under the head of "Existing Drainage," provided, in relation to the Hertford sewage, by Section 102, that the sewage and purification works, constructed by the New River Company, under the Acts of 1854 and 1857, together with all lands and buildings connected therewith, and used for the purposes thereof, and the use of so much of the Manifold ditch as was then used by the New River Company, subject, nevertheless, to the provisions of that Act of 1868, should be transferred to the Corporation of Hertford, and that all liabilities and duties under the Acts of 1854 and 1857, and that Act of 1868 in relation to such sewage works, sewage, and sewage water should be borne and undertaken by the Corporation; and by Section 104 that the Corporation should not at any time do, or permit to be done, anything which might cause the flow of any sewage waters from the town of Hertford into the portion of the Manifold ditch which was excepted from the operation of that Act, or into the New River.

As a part of general history of the case it will be well to mention in this place that Higgs' process, which in 1854 was considered to be the best practicable process, was unsatisfactory in its results, and allowed a great deal of injurious matter to flow into the Manifold ditch and the River Lea. Before

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the year 1870 considerable progress had been made in the discovery and application of new and improved processes for the purification of sewage, and as no improved process had been adopted at Hertford the Conservancy Board served upon the Corporation, a notice under Section 92 of the Act of 1868, requiring them to discontinue the flow of such injurious matter into the Lea. The Corporation did not dispute the justice of this requirement, and determined to adopt a new and improved process of purification, and they accordingly constructed, at an expense of £3,000, new and improved works for the treatment of the sewage, consisting principally of four additional settling tanks, and also filtering tanks in addition, and in the year 1874 the Corporation made arrangements with the Phosphate Sewage Company for the treatment of the sewage in the new works by means of the process known as the A B C process, then believed to be the best. The result was admittedly a decided improvement upon that obtained by Higgs' process, but still the actual results were in some respects not considered satisfactory to the Conservancy Board, who continued to make complaints from time to time of the state of things in the Manifold ditch, which they attributed to some imperfection in the purification of the sewage. In December 1876, the Phosphate Sewage Company falling into financial difficulties, gave up the treatment of the Hertford sewage, and for a certain time the Corporation took the matter into their own hands, until in April, 1878, they placed the management in the hands of the defendants, the Rivers Purification Association, who have ever since carried on the treatment of the sewage at the works. The process used by them is one known as Anderson's process, which may be described in a general way as mixing the sewage, as it enters the works, with solutions of sulphate of alumina, sulphate of iron and lime, and then passing the mixture through long settling tanks in which the suspended solid matters are allowed to subside and form a mud at the bottom of the tank, and then allowing the clear surface water in a thin superficial stream to decant itself off into filters, and, lastly, passing the effluent thus produced into the open straight cut. The practical results, however, of the treatment of the sewage by this process at Hertford still failed to give satisfaction to the Conservancy Board, and they continued to make complaints of the foul and injurious condition

of the Manifold ditch, and of a great accumulation of mud in the stagnant part of the Lea, resulting, as they alleged, from the deposit of foul matter proceeding from the Hertford sewage works. Mr. Bidder, on behalf of the plaintiffs, rested their claim upon two independent grounds. First, he said that the defendants caused damage and injury to the plaintiffs by permitting sewage water and other injurious matter to flow into the Manifold ditch and the River Lea, and although they might be applying the best known practicable process for the purification of the sewage and applying it as effectively as it could be applied, yet if injurious consequences resulted they were liable to an action, and were not justified by any power or authority conferred upon them by the Local Acts. Secondly, he contended that even if this were not so, yet the defendants had failed and neglected properly and effectively to apply the process they were using—assuming it to be the best—and by this neglect and omission had allowed untreated and imperfectly treated sewage and other injurious matter to pass into and pollute the Manifold ditch and the Lea. On the other hand, Mr. Webster, on behalf of the Corporation of Hertford, and the Solicitor-General, on behalf of the Rivers Purification Association, contended that they were treating the sewage as thoroughly and effectively as it was practicable to do, according to Anderson's process, and that doing so they were by virtue of the Acts of 1854 and 1868 relieved from all actions, even although some impurity might reach the Manifold ditch and the Lea through the flow into them of the sewage effluent after being so treated. Secondly, they contended that no real damage or injury was, in fact, caused to either by the flow into them of the sewage effluent, which, they contended, was thoroughly defœcated and clarified, and substantially free from offensive and injurious matters before it reached the Manifold ditch.

The first question then to be considered is as to the rights and obligations of the Lea Conservancy Board, and the Corporation of Hertford as regulated by the statutes. The New River Company, it will have been observed, were authorised and empowered by the Act of 1854 to construct certain sewers, and compulsorily to take land for the construction of works and channels, along a certain definite course within certain limits of deviation, with the option of a discharge at

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one or other of two exact and definite points upon the Lea, and by means of these sewers and channels to intercept the Hertford sewage, so as to prevent it flowing, as it had previously done, in an untreated state into the River Lea above the New River intake, and to carry it away, and to discharge it into the Manifold ditch and the Lea at a lower point after first effectively subjecting it to and treating it by the best known practicable process of purification.

The intention of the Legislature by this Act was, in my opinion, not merely to confer upon the New River Company as a Corporation the necessary power and capacity of expending their capital in the purchase of land, and construction of sewers for the reception, and collection, and carrying away of the Hertford sewage, leaving them to deal with it subject to all their common law responsibilities, but conferred upon them something more, namely, an authority and a right, subject only to the conditions as to treatment and purification, to discharge the effluent sewage water at either of two particular and defined places into the River Lea.

This conclusion seems to me legitimately to follow from the cases of *Vaughan v. The Taff Vale Railway Co.*, 5 H. & N., 689, approved of and confirmed in the House of Lords in the case of *The Hammersmith Railway Co. v. Brand*, L. R., 4 E. & I. A. 171, and from the opinion of Mr. Justice, now Lord, Blackburn in that case; *The Attorney General v. The Leeds Corporation*, L.R. 5 Ch. A. 583, and the opinion of Lord Watson in *The Metropolitan Asylums Board v. Hill*, L. R. 6 App. Cas. 212, 213, and I may add to those authorities the following additional reasons for my opinion. In the first place, if it had been intended by the Legislature to leave the New River Company, subject to their common law responsibility, without limitation, it would have been superfluous to have imposed upon them the express condition of subjecting the sewage to any process of purification before discharging it, because by the hypothesis they would have been, independently of any express provision, under an imperative and still more stringent obligation by the common law, not merely to treat the sewage by an efficient process of purification, but actually to do so successfully, or at their peril to discharge the effluent into the river so as to cause injury and damage to the riparian owners.

Secondly, looking to the fact that the inhabitants of Hertford had probably acquired prescriptive rights of discharging sewage and other injurious matters in the Lea, and causing serious and dangerous pollution of the water, it can well be understood that the Legislature may have been persuaded that it was highly advantageous and beneficial, not only to the public generally, but also to the riparian owners upon the river below Hertford, that the sewage should be diverted from the points where it had previously flowed into the river in its untreated state, and should then be discharged, after having been treated by the best known process of purification, into the river at a lower point.

Thirdly, there is the absolute prohibition in the Act of 1868, by which the powers were transferred from the New River Company to the Corporation of Hertford, against discharging any of the effluent water under any circumstances into any part of the New River itself, which shows that a perfect purification as for drinking water was not intended to be an absolute condition precedent to the lawful return of the sewage water into the Lea itself at the authorised point, but that it would be sufficient if it was thoroughly treated according to the best and most approved process of purification. The result is this, that so long as the New River Company treated the sewage thoroughly and effectively, according to the best known practicable process for purification, then no action would have lain against them.

I wish it to be understood that I am far from thinking that the Legislature intended to authorise what would otherwise have been a clear actionable nuisance at common law. I consider the true view to be that the Legislature considered that the Hertford sewage, if thoroughly and properly treated by the best known process of purification, and then carried for nearly a mile in a rapid stream, through an open channel, might safely be discharged into the Manifold ditch without any probability of creating any real or substantial injury or nuisance to any one, although it might be in a state by no means sufficiently free from impurities to render it fit to be discharged into a stream from which drinking water would be drawn, and that the Legislature, so considering, intended to legalise the discharge of the sewage there after it had been thoroughly treated by the best known process.

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There is the further question of law as to the effect of the statute of 1868 constituting the Lee Conservancy Board, and transferring the duties of the New River Company to the Corporation of Hertford. For the plaintiffs it was contended that whatever rights may have been conferred upon the New River Company, under their Act of 1854, to discharge imperfectly purified sewage water into the Lea, nevertheless under the Act of 1868 their successors, the Corporation of Hertford, acquired none, and that their powers of discharging the sewage water into the Lea were strictly subject to the common law restrictions against discharging any injurious or deleterious matter. I am unable to assent to this contention. It seems to me that the Act of 1868 may be said to have practically transferred all the duties, powers, and obligations of the New River Company to the Corporation with some modifications which do not touch the present question.

There now remain the two questions of fact which were discussed before me. First. Are the defendants treating the Hertford sewage thoroughly and effectively according to Anderson's process? Secondly. Whether this is so or not, are the defendants doing any real and substantial damage and injury to the waters of the Manifold ditch, and the river Lea.

HIS LORDSHIP then went fully into these questions of fact, and after an exhaustive examination of the evidence arrived at the conclusions:—(1.) That the defendants had treated and were treating the sewage thoroughly and effectively according to Anderson's process. (2.) That no real injury, pollution, or nuisance had been caused to the waters of the Lea: and gave judgment for the defendants.

Gedge, Kirby & Co. J. W. Mason. Tucker & Lake.

LOPES, J.

GROVES, MACLEAN & CO. v. VOLKART BROS.

1884.

June 30.

THIS was an action by shipowners against charterers for damages for breach of charter-party in not loading a cargo of grain.

Cohen, Q.C., and Edge, for the plaintiffs.

Finlay, Q.C., and Barnes, for defendants.

The facts and arguments sufficiently appear from the judgment.

A charter-party provided that should the steamer not be ready to load on or before the 31st May, 1882, the charterer should have the option of cancelling the charter. On that day, the vessel had discharged two holds only of its outward cargo, and was not completely discharged till the middle of the following day. Held, that the charterers were entitled to cancel the charter.

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LOPES, J.—This case was tried before me without a jury.

The question is, whether the plaintiffs have broken the contract into which they entered, and the defendants are thereby justified in cancelling it.

It is contained in a charter-party, dated 24th Nov., 1881, made between the plaintiffs, owners of the s.s. *Hasland*, and the defendants, merchants, carrying on business at Bombay and in London, by which it was agreed that the *Hasland* should proceed to Bombay, or so near thereto as she may safely get, and lie always afloat, and there load in the customary manner from the factors of the said merchants, a complete cargo of cotton and wool, and being so loaded shall therewith proceed, *vid* Suez Canal, to any safe port in the United Kingdom or other places in the charter-party mentioned.

Charterers were to have the option to pay whole or part of the freight before sailing in cash at current exchange without any deductions. Twelve working days (Sundays and holidays excepted) are to be allowed the said merchants, if the said ship be not sooner despatched, for loading the ship at Bombay, to commence and be computed twenty-four hours from the time written notice is given by the captain to the charterers' agents that the steamer is ready to receive cargo, and ten days' demurrage at 40*l.* per day. The cargo was to be brought to and taken from alongside the ship at merchant's risk and expense.

The vessel was to be consigned to charterers' agent at the

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port of loading. Lay days were not to commence before the 20th April, 1882. Should the steamer not be ready to load on or before the 31st of May, 1882, charterers were to have the option of cancelling the charter, same to be declared on the steamer being ready to receive cargo. Charterers, or their agents, might either load the steamer in the stream or in Prince's Dock.

The *Hasland* arrived at Bombay with a cargo of coals on the 28th of May, and notice was given to the defendants on the 30th of May that the vessel would be ready to load her cargo on the 31st of May.

On the 31st of May, the defendants gave notice to the captain that they required the vessel to load in Prince's Dock. The defendants had not before this intimated to the plaintiffs whether they would load in the stream or in Prince's Dock.

No loading berth had been provided in the dock, nor had any permission been obtained to enter the dock. On the 31st of May, there was not any place or loading berth in the dock for the vessel. After he had received the notice from the defendants, the captain requested the dock authorities to allow the vessel to enter the dock, which they refused. The captain informed the defendants of his request and its refusal, and the defendants at 2.30 o'clock in the afternoon of the 31st of May, delivered to the captain a notice to the effect that they required the s.s. *Hasland* to be ready in Prince's Dock that day in the terms of the charter-party, failing which, they considered the charter-party as cancelled.

The captain again requested the dock authorities to allow the vessel to enter the dock, but was refused, and the defendants, when the refusal was communicated to them, declared the charter cancelled.

The *Hasland* being unable to enter the dock, proposed to load in the stream.

On the 31st of May the *Hasland* was discharged in two holds, but the other two holds were not discharged till one o'clock in the afternoon of the 1st of June.

The above are the facts of the case so far as it is necessary to state them.

I am of opinion that the true construction of the charter-party is, that the steamer must be ready to load within

working hours on the 31st of May, either in the stream or in Prince's Dock, as ordered.

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In the circumstances of this case, I think it unnecessary to consider whether the steamer was bound to be ready to load at the specified time in Prince's Dock. The reasonableness of the notice given by the defendants of the exercise of their option, and other matters, would have to be considered if this point was material to the determination of this case.

Clearly, the *Hasland* was bound to be ready to load at one of the alternative places, or somewhere, at the specified time. Two only of her holds were discharged on the 31st of May.

Can it be said, in these circumstances, that she was ready to load on the 31st of May at either of the alternative places, or anywhere?

I think it cannot. A ship to be ready to load must be completely ready in all her holds, must be discharged in all her holds, so as to afford the merchant complete control of every portion of the ship available for cargo. The merchant can then stow his cargo as he thinks most advantageous.

In no other circumstances can a ship, by which I understand must be meant an entire ship, be placed at the disposal of a merchant. If any other construction is placed on the words "ready to load," it is obvious that great inconvenience would arise.

It might be contended that a ship was ready to load when one hold only was empty, and a merchant might not have the rest of the ship placed at his disposal for an indefinite period.

I doubt not but that the defendants were anxious, and schemed to be able to cancel this charter-party; but still, I am bound to give effect to what I believe to be its true meaning.

A custom was set up by the plaintiffs to load and unload simultaneously, but it was not proved—in fact was disproved.

There will, therefore, be judgment for the defendants, with costs.

Turnbull, Tilley, & Co.

W. A. Crump & Son.

HAWKINS, J.

HEYWORTH v. THE MAYOR, ETC., OF LONDON,
AND RHODES.

1884.

February 8.

Where in an action in an inferior court, upon the facts disclosed at the trial and relied on by the plaintiff, a clear want of jurisdiction over the cause is for the first time made apparent, the defendant has a right, at any time before execution has been completed, to claim a prohibition to restrain all further proceedings, and to prohibit any further excess of jurisdiction. Prohibition will not go to an inferior court, if such court had *in fact* jurisdiction over the cause, although the facts in evidence at the trial in the inferior court were not such as to give that court jurisdiction.

DECLARATION in Prohibition to prohibit the defendants from taking further proceedings upon a verdict obtained by the defendant Rhodes in the Mayor's Court.

Kemp, Q.C., and Rolland, for the plaintiff.

Finlay, Q.C., and Mirams, for the defendants.

The facts and arguments fully appear from the judgment of the learned Judge.

In addition to the cases referred to in the judgment, the following were cited in argument: *Marsden v. Wardle*, 23 L. J. Q. B. 263; *Denton v. Marshall*, 32 L. J. Ex. 89; *Mayor of London v. Cox*, L. R. 2 H. of L. 239; *Evans v. Nicholson*, 32 L. T. N. S. 778.

HAWKINS, J.—This was a declaration in prohibition, under 1 Will. 4, c. 21, s. 1, to prohibit the defendant Rhodes from suing out, and the defendants, the Mayor and Aldermen, from giving judgment upon a verdict found for the now defendant, Rhodes, for 96*l.*, in a suit instituted by him in the Mayor's court, against the now plaintiff Heyworth and one Hawkins, for wrongful dismissal from service, upon the ground that the suit was one over which the Mayor's court had no jurisdiction, both the contract of service and the breach of it having arisen at Manchester, and not within the jurisdiction of the Mayor's court. Issues were joined on this declaration, which came on to be tried before me and a special jury on the 8th of February last, when the following facts were proved. The action in the Mayor's court, *Rhodes v. Heyworth and Hawkins*, was brought for the recovery of 196*l.* 9*s.*, of which 16*l.* 9*s.* was paid into court by the defendant Hawkins (the defendants having severed in their pleadings). It was tried by Mr. Brandon, one of the judges of the court. Mr. Brandon was called to produce his notes, from which it appeared, that before him the contract of service relied on at the trial was a

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verbal one, made at Manchester, and the breach of it was established by a letter, posted by the defendant Heyworth in Manchester, addressed to, and received by, the plaintiff in London. There was no other evidence of the cause of action, or any part of it, having arisen in London. An attempt was made to prove that two letters, one of the 27th January, 1882, from Hawkins, in Manchester, to Rhodes, in London, and one other of the 28th January, 1882, from Rhodes, in London, to Hawkins, in Manchester, and which were said to amount to a written contract between the parties, were also in evidence before Mr. Brandon; but this was negatived by the jury. I allowed those letters, however, to be put in evidence before me, thinking and holding, that if they shewed that *in fact* the cause of action arose within the jurisdiction of the Mayor's court, the mere omission to put them in evidence at the trial before Mr. Brandon would not be sufficient to oust the jurisdiction. I have, therefore, carefully considered them, but I think they do not establish the position contended for by Mr. Rhodes's counsel. First of all it is to be observed, that if they formed a distinct contract, that is not the contract on which the jury gave their verdict; they had only evidence of a verbal contract in Manchester. If the defendants wished to defeat the verbal contract, by shewing that it was absorbed or merged in a written one, they should have done this by putting in the evidence on which they relied. Not having done so, the plaintiff must be taken to have relied, and succeeded, on the verbal one, which was clearly made out of the jurisdiction. My opinion being that the contract relied on was made out of the jurisdiction, it is unnecessary to determine the more difficult question, whether, inasmuch as the letter terminating the engagement was received in London, though posted in Manchester, the breach can be said to have been committed in London, and so within the jurisdiction, for it was frankly admitted by the learned counsel for Mr. Rhodes, that the action being for a sum exceeding 50*l.*, there was no jurisdiction, unless the *whole* cause of action arose within it.

This brings me to the only other question, namely, whether there being no plea to the jurisdiction, the objection to the want of jurisdiction comes too late.

I am of opinion, that it does not. At present, no judgment

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1884. has been given upon the verdict ; the case does not, therefore, fall within the decision of *Hall v. Norwood* (1 Sid. 165), which Maule, J., in *Kimpton v. Willey* (19 L. J. C. P. 269), said was a "distinct authority to show that a prohibition will not go after execution has been completed ;" the reason given being, that there is no person to be prohibited (see also, *In re Poe*, 5 B. & Ad. 681), nor within the more limited rule stated in *Ex parte Cowan*, (3 B. & Ald. 123), that you cannot apply for a prohibition after judgment, unless there be an original want of jurisdiction apparent upon the face of the proceedings. In *Full v. Hutchins*, (Cowp. 422), after sentence in the Ecclesiastical Court, a prohibition was refused, but that was upon the ground that the Ecclesiastical Court had jurisdiction of the cause, and the defect in jurisdiction alleged was only in the trial of an issue raised by the applicant, and to the trial of which by the Ecclesiastical Court the applicant had submitted. For that reason, it was held, he could not have prohibition after such trial, merely to avoid payment of costs.

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The essential difference between that case and the present is, that in the case now before me, the Mayor's court never had jurisdiction over the cause. Upon the same principle, the rule for a prohibition was refused in the case in 10 East, 349, cited in the notes. I do not feel it at all necessary to discuss the details of all the authorities cited in the course of the argument. I shall content myself, therefore, with saying, that having carefully considered them all, I have come to the conclusion that where, as in this case, upon the facts disclosed at the trial, and relied on by the plaintiff, a clear want of jurisdiction in an inferior Court over the cause is for the first time made apparent, the defendant has a right at any time before execution has been completed to claim a prohibition to restrain all further proceedings, and to prohibit any further excess of jurisdiction.

In this action, therefore, the verdict and judgment will be entered for the plaintiff, Mr. Heyworth, and with costs.

Shaw & Tremellen.

Walker, Son, & Field.

WILLIAMS, J., and a C. J.

INTERLEAF PUBLISHING CO. v. PHILLIPS.

1884.

April 23.

THIS was an action for the price of advertisements.

F. Pollock for the plaintiffs.

Lockwood, Q.C., and *Atherly Jones*, for defendant.

In the course of the case, *Lockwood, Q.C.*, tendered in evidence a document upon which he had been cross-examining one of the defendant's witnesses. The document contained an agreement, but was unstamped. He argued that, notwithstanding sect. 17 of the Stamp Act, 1870 (33 & 34 Vict. c. 97),* the document was admissible in evidence unstamped, as he did not tender it as evidence of the agreement, but merely for the collateral purpose of contradicting the witness on another point.

An unstamped document embodying an agreement, not falling within the exceptions specified in the Act 33 & 34 Vict. c. 97, is inadmissible in evidence in civil proceedings for any purpose whatever.

WATKIN WILLIAMS, J. (after consultation with some of the other learned judges), said: "I have consulted other judges of much greater experience in these matters than myself. It is perfectly clear that the document contains what purports to be an agreement. Under these circumstances, the judges I have consulted unanimously agree with me that the document is inadmissible. Whatever the old law may have been, the words of the 17th sect. of 33 & 34 Vict. c. 97, are perfectly clear, and this document, while not coming within any of the exceptions mentioned in the Act, does fall within the express words of the 17th sect. I hold, therefore, that the document cannot be admitted in evidence for any purpose at all, unless it be stamped."

W. B. Ashton.

Huttford & Taylor.

Ex. rel. R. B. D. Acland.

* Section 17. Save and except as aforesaid no instrument executed in any part of the United Kingdom, or relating, wheresoever executed, to any property situate, or to any matter or thing done or to be done, in any part of the United Kingdom, shall, except in criminal pro-

ceedings, be pleaded or given in evidence, or admitted to be good, useful, or available in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed.

STEPHEN, J.

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May 7.

FURLONG v. SOUTH LONDON TRAMWAYS CO.

A conductor of a tramcar gave into custody a passenger who tendered him a half-sovereign in payment of his fare, wrongly thinking it a bad one. Sects. 51 & 52 of the Tramways Act, 1870 (33 & 34 Vict. c. 78,) empower officers or servants of the promoters, or lessees, of any tramway, to seize and detain any person seeking to avoid payment of his fare. Held, that the company were liable for the wrongful act of the conductor.

THIS was an action to recover damages from the defendant company for wrongfully giving the plaintiff into custody through their conductor.

The plaintiff was a traveller in one of the defendants' tram-cars, and tendered half a sovereign in payment of his fare. The conductor, believing it to be a bad one, gave him into custody. The half-sovereign was a good one.

Kemp, Q.C., and Melsheimer, for plaintiff.

Murphy, Q.C., and J. D. Fitzgerald, for defendant.

The jury having found a verdict for the plaintiff for 10*l.*, his lordship reserved for further consideration the question whether the defendant company were liable for the wrongful act of their servant.

The following authorities were referred to :—*Goff v. Great Northern Railway Co.*, 3 E. & E. 672 ; *Poulton v. London and South-Western Railway Co.*, L. R. 2 Q. B. 584 ; *Moore v. Metropolitan Railway Co.*, L. R. 8 Q. B. 36 ; *Barwick v. English Joint Stock Bank*, L. R. 2 Ex. 259 ; *Bank of New South Wales v. Owston*, L. R. 4 Ap. Ca. 270 ; 33 & 34 Vict. c. 78, ss. 51 & 52* (Tramways Act, 1870).

May 17.

* *Section 51.* If any person travelling or having travelled in any carriage on any tramway avoids or attempts to avoid payment of his fare, or if any person having paid his fare for a certain distance knowingly and wilfully proceeds in any such carriage beyond such distance, and does not pay the additional fare for the additional distance, or attempts to avoid payment thereof, or if any person knowingly and wilfully refuses or neglects, on arriving at the point to which he has paid his fare, to quit such carriage, every such person shall, for every such offence,

be liable to a penalty not exceeding forty shillings.

Section 52. It shall be lawful for any officer or servant of the promoters or lessees of any tramway, and all persons called by him to his assistance, to seize and detain any person discovered either in or after committing, or attempting to commit, any such offence as in the next preceding section is mentioned, and whose name or residence is unknown to such officer or servant, until such person can be conveniently taken before a justice, or until he be otherwise discharged by due course of law.

STEPHEN, J.—There must be judgment for the plaintiff. It is said that the arrest was on a criminal charge of uttering base coinage, and that the conductor had no authority to cause the plaintiff to be arrested on such a charge, and so the defendants are not liable in this action. It seems to me, however, that as the conductor has power under the Tramways Acts to seize and detain any passenger seeking to avoid payment of his fare, and as the act for which the conductor caused him to be arrested would, if it had been well founded, have necessarily involved an evasion of the payment of his fare, the arrest was not an act which the company can say was unauthorised.

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FURLONG
v.
SOUTH LONDON
TRAMWAYS CO.

Lovett & Co.

Wilkins, Blyth, & Dutton.

FIELD, J.

BIRD v. LORD GREVILLE.

1884.
May 19th.

THIS was an action for rent from the 28th of March, 1883, to the 4th of July, 1883, under an agreement made on the 13th of March, 1883, by which the plaintiff let to the defendant a furnished house from the 28th of March till the 4th of July at the rent of 14 guineas per week.

The defence was that the defendant was justified in refusing to take the house, and to pay the rent for the same, inasmuch as the house was infected by measles at the time the agreement was made, and at the time the defendant was to take possession thereof.

A child was suffering from measles in the house from the 10th of March up to the 19th, but was then removed. On the 20th, the defendant, hearing of the measles for the first time, refused to take the house. After the child was removed, steps were taken to disinfect the premises. His lordship, however, found as facts that the best disinfecting processes were not used, and also that the house was not free from infection on the 28th.

Charles, Q.C., and *Houghton* for the plaintiff contended that even if it were the fact that the house was not free from

One who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. If in such a case the lessor sue for rent, he must shew, to entitle him to succeed, that the house was in fact in a state fit for human occupation at the date fixed for the commencement of the term, notwithstanding a previous intimation by the tenant of his intention to repudiate the contract.

1884. infection on the 28th, still if it were possible that it might
 BIRD have been so free, the plaintiff was entitled to succeed,
 v. because, after the defendant's refusal to take the house on the
 LORD GREVILLE. 20th, the plaintiff was not bound to take any steps to disinfect the premises.

Murphy, Q.C., and Crump, for the defendant.

FIELD, J., referred to the cases of *Smith v. Marrable* (11 M. & W. 5; 12 L. J. Ex. 229) and *Wilson v. Finch-Hatton* (L. R. 2 Ex. D. 936), and said that according to these cases the question he should ask a jury, and which he must therefore ask himself, was—Was the house in a good and tenantable condition and reasonably fit for human occupation from the very day on which the tenancy is dated to begin? Unless this condition were fulfilled the defendant was not bound to take the house, and in his opinion it was not fulfilled.

Judgment for the defendant.

Upton, Atkey, & Upton.

Lewis & Lewis.

"The law with reference to a contract to be performed at a future time, where the party bound to performance announces prior to the time his intention not to perform it, as established by the cases of *Hochster v. De la Tour* (2 Ell. & Bl. 678; 22 L. J. Q. B. 455) and *The Danube & Black Sea Company v. Xenos* (13 C. B. N. S. 825; 31 L. J. C. P. 284) on the one hand, and *Avery v. Bowden* (5 Ell. & Bl. 714; 26 L. J. Q. B. 3); *Reid v. Hoskins* (6 Ell. & Bl. 953; 26 L. J. Q. B. 5), and *Barwick v. Buba* (2 C. B. N. S. 563; 26 L. J. C. P. 280) on the other, may be thus stated. The promisee, if he pleases, may treat the notice of intention as inoperative, and await the time when the contract is to be executed, and then hold the other party responsible for all the consequences of non-performance; but in that case he keeps the contract alive for the benefit of the other party as well as his own. He remains subject to all his own obligations and liabilities under it, and enables the other party not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, but also to take advantage of any supervening circumstances which would justify him in declining to complete it. On the other hand, the promisee may, if he thinks proper, treat the repudiation of the other party as a wrongful putting an end to the contract, and may at once bring his action as on a breach of it, and in such action he will be entitled to such damages as would have arisen from the non-performance of the contract at the appointed time, subject, however, to abatement in respect of any circumstances which may have afforded him the means of mitigating his loss." Per Cockburn, C. J., in *Frost v. Knight*, L. R. 7 Ex. p. 112.

It will be observed that in the above-reported case, the action was brought for *rent*.

HUDDLESTON, B.

ASTE, SON, AND KERCHEVAL *v.* STUMORE,
WESTON, AND CO.

1884.

June 12.

THIS was an action to recover back the sum of 97*l.* 16*s.* 6*d.*, paid under protest. The plaintiffs were the indorsees of a bill of lading for a cargo of grain shipped on board the defendants' ship *Huntingtower* at Philadelphia, for London. The material terms of the bill of lading were as follows:—
 "Shipped, &c., &c., . . . the said goods to be delivered at the aforesaid Port of London unto shipper's order or to assigns, he or they paying freight and charges immediately on landing of the goods without any allowance of credit or discount at the rate of 5½*d.* per 60 lb., delivered, with primage and average accustomed, merchandise to be received on quay at London and delivered therefrom by the person appointed by the steamship's agents, and to be at owner's risk until removed, owner to pay the expense of watching. The collector of the port is hereby authorised to grant a general order for discharge immediately after arrival of the goods. The goods are at the risk of the consignees when landed, and must be taken away from point of delivery by the consignees immediately, or they will be liable to be stored by the steamship at the expense of the consignees and at their risk of fire, loss, and injury, on the wharf, in the warehouse or sheds provided for that purpose, or elsewhere, or they may be sent to the public store, as the collector of the port shall direct, at the expense and risk of consignees; all liability to cease as soon as landed from the ship's tackles. The owners or agents of the steamship to have a lien on these goods for all freight, dead freight, demurrage, and average. The merchandise to be received and delivered according to the customs and usages of the respective ports."

The vessel was reported in the river on the 19th of April, and began to discharge the goods on to the dock quay at 1 p.m. on the 20th. The plaintiffs obtained the freight release on April 23rd and lodged it on the 24th. Delivery of the goods was not demanded by the plaintiffs within 24 hours after the ship's arrival. The quay rates charged by the dock company

A bill of lading stipulated (*inter alia*) that "the merchandise shipped thereunder was to be received on the quay at London, and delivered therefrom by the person appointed by the steamship's agents, &c. the merchandise to be received and delivered, according to the customs and usages of the respective ports." A custom was proved with regard to grain cargoes coming to London, that if the merchant does not demand delivery of the grain within twenty-four hours after the ship's arrival, the ship is entitled to discharge the goods on the quay. The merchant did not demand delivery of the cargo within the twenty-four hours, and it was landed on the quay. Held, that notwithstanding the custom, the ship-owners were bound to pay the expenses incurred in weighing out the cargo, and the quay rates.

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were the same if the goods landed on the quay were removed at any time within seven days from the date of their landing. The plaintiffs paid the defendants the freight and charges with the exception of two sums of 58*l.* 13*s.* 11*d.* and 39*l.* 2*s.* 7*d.*, the first of which was incurred by the defendants in working out, weighing, and delivering the grain over the ship's side, and the second paid by them for the quay rates, which sums the plaintiffs refused to pay, alleging that they were entitled by the terms of the bill of lading to have the grain delivered to them free on the quay. The money was ultimately paid by the plaintiffs under protest, and this action brought to recover it back.

Murphy, Q.C., and *Pyke*, for the plaintiffs.

Finlay, Q.C., and *J. G. Barnes*, for the defendants.

Evidence was adduced on the part of the defendants to prove a custom in the Port of London with regard to grain cargoes—that if the merchant does not demand delivery of the grain within 24 hours after the vessel's arrival, the ship is entitled to discharge the goods on the quay.

HUDDLESTON, B., after stating the facts, continued—"It is clear that there is a custom, perfectly well known, that when grain arrives in the Port of London, whether in bulk or in bags, and delivery of it is not demanded by the consignees within 24 hours after the ship's arrival, the ship is entitled to discharge on the quay. If, therefore, there were no stipulation to the contrary in the bill of lading, the goods owner would have to pay the quay rates and working out charges where, as here, he did not demand delivery within the 24 hours. The question is, is there any stipulation to the contrary in the bill of lading, for if there is an absolute contract, no custom could operate to do away with the terms agreed upon. It appears to me that by the bill of lading the shipowner is bound to deliver the goods on the quay, where the merchandise was to be received. The goods owner has to pay watching expenses, and the liability of the ship with respect to the goods ceases as soon as they are landed from the ship's tackles. All expenses which may have arisen in putting the goods on to the quay must be borne by the ship. With reference to the quay rates I feel more difficulty. The plaintiffs say that

the mere fact of working out the goods on to the quay entails the payment of the quay rates, and that, therefore, the defendants are liable to pay them. Although I feel a doubt, I think this is the correct view. The last clause of the bill of lading has been relied on by the defendants, but this could not operate to do away with the express stipulations of the bill of lading, and on this point Lord Blackburn's remarks in *Postlethwaite v. Freeland* (L. R. 5 App. Cas. 613) directly apply. I give judgment for the plaintiffs.

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The Court of Appeal (Brett, M. R., Lindley and Cotton, L. J.) reversed this decision, holding that the custom was not inconsistent with the terms of the bill of lading.

CAVE, J.

BURGESS AND COSENS *v.* GILLESPIE.

1884.

June 19.

THIS was an action to recover 187*l.*, the amount of a solicitor's bill, and the question was, whether certain composition proceedings were not a bar to the claim.

On April 17th, 1882, the defendant filed his petition for liquidation, by arrangement or composition, under the Bankruptcy Act of 1869. On May 5th, 1882, a meeting of the defendant's creditors was held, at which a resolution was passed, that a composition of 8*s.* 6*d.* in the pound should be accepted in satisfaction of the defendant's debts, and that the composition should be payable by instalments of 2*s.* 6*d.* in the pound within a week from the registration of the resolution confirming the composition, and 1*s.* in the pound within six weeks from the date of the payment of the first instalment, such composition being secured to the satisfaction of the chairman and three other creditors, and that one Masson be appointed trustee in the matter for the receipt and distribution of the composition. At this meeting a member of the plaintiffs' firm attended, and voted upon a proof of 50*l.*

The resolution was duly confirmed at a meeting of creditors, held on the 17th of May, 1882. This confirmation was signed by the same member of the plaintiffs' firm, who

Where a trustee for creditors in composition proceedings, under the Bankruptcy Act of 1869, might, but for his default, have been in funds to pay an instalment on the due date, the legal consequences, so far as the debtor is concerned, are the same as if the trustee had been in funds. Where, after a composition, payable by instalments at fixed dates, has been agreed upon, a creditor sends in an amended proof for a larger sum, the trustee is entitled to a reasonable time from the sending in of such amended proof for payment of the amount due thereon.

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attended the meeting, and was duly registered on the 7th of June, 1882.

The security accepted as satisfactory by the chairman and three creditors was the personal covenant of one Dick; to pay Masson within seven days from the registration of the resolution of the 17th of May, 1882, such a sum as should be equal to the preferential debts, and also such a sum as should be equal to the amount of 8*s.* 6*d.* in the pound upon all the defendant's debts other than the preferential debts, by two instalments, the first instalment of 2*s.* 6*d.* in the pound within five days from the registration of the resolution, and the second instalment of 1*s.* within five weeks from the registration of the said resolution, to the intent that the same might be distributed among the defendant's creditors *pari passu*.

All the defendant's stock, machinery, household furniture, and effects, and book debts were assigned to Dick. On June 12th, 1882, Masson told Dick that 600*l.* would be required to pay the instalment due upon June 14th. Dick was ready and willing to pay this sum, but as there was a sum of 100*l.* standing to the defendant's credit at his banker's, Dick at Masson's request gave Masson a cheque for 500*l.*, and an order to receive the 100*l.* from the defendant's bankers.

If Masson had procured the 100*l.* from the bank, he would on the 14th of June have had sufficient in hand to pay a dividend on the debts proved, including even the plaintiffs' amended proof hereinafter mentioned, but without that 100*l.* he had not enough to pay a dividend on the debts proved, taking the plaintiffs' debt at only 50*l.* On June 14th, the plaintiffs delivered to Masson an amended proof for 187*l.* 10*s.* 2*d.*, in substitution of their original proof of 50*l.* On June 16th, Dick gave Masson a cheque for 100*l.*, on Masson informing him (as the fact was) that he could not obtain the 100*l.* from the bank, as some formalities had to be complied with before he could obtain it. Subsequently to the 14th of June, the plaintiffs made application to Masson from time to time for payment of the dividend on their amended proof, but Masson had never paid them anything.

It was Masson's own default that he had not the 100*l.* on the 14th.

On July 26th, he had enough to pay the second instal-

ment. It was owing to Masson's default that the plaintiffs had never received their composition.

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Kemp, Q.C., and Sparham, for the plaintiffs.
Morten Smith for the defendant.

CAVE, J.—It is clear that if the trustee had received a sufficient sum to enable him to pay the instalment on June 14th, his default in paying it over to the creditors would not prevent the debtor from being discharged. Here, it is true, the trustee had not a sufficient sum in his hands on June 14th, but he could have had it but for his own default, and it was his duty, when he found that he could not get the 100*l.* from the bank, to have at once gone and got it from Dick, who was willing to have paid what was required. Where the trustee might have received the money but for his own fault, the legal consequences, so far as the debtor is concerned, are the same as if he had received it. Again, the plaintiffs, in my opinion, by continuing to demand the composition after the money was in the hands of the trustee, waived, as they were entitled to waive, the stipulations for payment of the instalment on the 14th of June.

Further, it was not until the 14th of June, that the plaintiffs altered their claim from one for 50*l.* to one for 137*l.*; and in my opinion, the effect of this was, to give a reasonable time after the 14th of June for payment of the instalment on the enlarged claim; and I think that such reasonable time had not been exhausted on June 16th, on which day the trustee was in funds to pay the instalment on the enlarged claim.

There must, therefore, be judgment for the defendant.

E. H. Barlee.

W. Byrne Jones.

CAVE, J., and a C. J.

1884.
July 1.

WAGSTAFF v. SHORT-HORN DAIRY COMPANY.

On a sale of seed potatoes, the potatoes were of an inferior quality to that warranted. Held, that the purchaser was entitled to the difference in value between the crop actually produced and the crop that would have been produced if the warranty had been complied with, if it were a reasonable thing for the purchaser to plant the seed without examination.

THIS was an action to recover the price of certain seed potatoes. The sale and delivery were admitted, but the defendants counterclaimed for damages for breach of warranty by the plaintiff, that the potatoes were "Early Don Regents."

The amount of seed supplied was twelve tons, and the amount produced therefrom was thirty-five tons. The defendant alleged (and the jury found) that the potatoes supplied to him, instead of being "Early Don Regents," were a mixed lot of "Early Don Regents" and "Bastards." The evidence shewed that the mixed potatoes were worth 80s. per ton less than the pure "Don Regents."

Wedderburn for the plaintiff.

C. H. Anderson for the defendants.

CAVE, J., to the jury.—If you find that there was a breach of the warranty, then the question of damages arises. As to this, the question is, ought you to calculate the damages on the original twelve tons, or on the thirty-five tons grown? If you think that the defendants ought to have examined the potatoes before planting them, and ascertained their quality, you will give damages on the twelve tons. If you think that the defendants acted reasonably in not examining them before planting, you will give damages on the thirty-five tons.

The jury gave damages on the thirty-five tons.

See *Randal v. Roper*, E. B. & E. 84 ; 27 L. J. Q. B. 266.

STEPHEN, J.

RAPHAEL AND SONS v. BURT & CO.

1884.
July 2.

THIS was an action to recover the sum of 728*l.* 7*s.* 11*d.* paid by the plaintiffs to the defendants, in purchase of certain "Called Bonds" of the United States of America.

Finlay, Q.C., and *Raphael*, for the plaintiffs.

Cohen, Q.C., and *F. Hollams*, for the defendants.

The facts and arguments are fully stated in the judgment of the learned Judge.

July 7.

STEPHEN, J.—This action was tried before me without a jury on July 2, when I reserved judgment.

The facts were these:—

The plaintiffs, who are foreign bankers, purchased of the defendants four bonds of the Government of the United States, known as 5·20 bonds, for the sum of 728*l.* 7*s.* 11*d.*

The nature of these bonds was as follows:—

They are all payable to bearer, issued in 1865, redeemable at the pleasure of the United States after the 1st of July, 1870, and payable at all events on the 1st of July, 1885, with interest, at 6 per cent. per annum up to the time when the United States Government "called" them, that is to say, gave notice to the holders by public notification that they would be paid on presentation. The bonds were delivered by the defendants to the plaintiffs on the 30th of April, 1879, and were paid for by the plaintiffs on delivery. All of them had before that time been "called" in the sense explained above by the United States Government to the knowledge of both parties. This transaction was carried out in perfect good faith, and in the common course of business, by both parties.

When the bonds were presented for payment in the United States, but no evidence was given of any case in which payment of a bond had been refused. A. sold to B. in accordance with the above course of business certain "Called Bonds," which had been originally stolen from American holders, and payment to B. of the bonds was refused by the American Government. Held, that there was an implied warranty of title on the sale by A. to B., and that B. was entitled to recover from A. the price paid.

The Government of the United States in 1865 issued bonds payable to bearer, redeemable at the pleasure of the Government, after 1870, and payable, at all events, in 1885. When the Government wished to redeem any of these bonds, they gave notice to holders by public notification that they would be paid on presentation. After such notice, the bonds notified were called "Called Bonds." These bonds are dealt in in England for the purpose of making remittances to America. The course of business is for the seller to supply the buyer with bonds or coupons of railway companies, etc., payable in America at an agreed price, no particular bonds or coupons being specified. It was proved that whenever default was made in payment of the coupons in America, the seller returned the money paid

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States, it appeared that they had been (with others) stolen from a body called the Manhattan Savings Institution, which upon their presentation claimed them.

The Treasury Department of the United States hereupon refused to pay the bonds, and referred the question as to who was entitled to them to a court, called the Court of Claims, which delivered a judgment to the effect that the Manhattan Institution was, and that the agents of the plaintiffs were not, entitled to be paid the amount secured by the bonds.

The plaintiffs then sued the defendants to recover the sum paid for the bonds. They put their claim on the ground of a failure of consideration, breach of an implied warranty of title, and a custom alleged to exist in the city of London, that in such cases the vendor of the bonds should return the money paid for them, if they were not paid.

Several witnesses were called by the plaintiffs in support of the existence of such a custom, but they all agreed that they had never known a case before the present one in which there had been a failure to pay a drawn bond, though there had been cases in which there was a failure to pay overdue coupons of railway, or other private corporations. In such cases the vendor always returned the money paid for the coupons.

This evidence appeared to me to fail to establish any custom upon which the case could be decided, and I must therefore decide it on general grounds. I may, however, mention some other points which were established by the different witnesses.

It was proved that before the purchase of the bonds the Treasury Department of the United States had given notice that the 5·20 bonds would be paid to the bearer, irrespectively of his title, and that the plaintiffs knew of this notice. But it was not proved that this applied specifically to bonds which had been "called." It was also proved that "called" bonds of the United States were well known securities commonly bought by and sold to persons desirous of remitting to America the amounts represented by them.

The questions between the parties were as follows :—

1. The defendants affirmed and the plaintiffs denied that the bonds being payable to bearer, were like bank-notes,

so that a good title to them might be made by simple delivery.

2. The plaintiffs affirmed and the defendants denied that there was an implied warranty by the vendors that they had a good title to the bonds, and that the badness of the title produced a total failure of the consideration for the sale.

With respect to the first point, the first matter to be considered is the effect of the judgment pronounced by the American Court of Claims : shortly, it was to the effect that if the purchase had taken place before the expiration of the period specified in the call for payment of interest, the holders of the bonds would have had a good title as against all the world, but that as the purchase took place after that period, the purchaser acquired no better title than the vendor had to give.

The effect of the judgment is summed up in these words :—" We therefore hold that each of the bonds in question did in law become matured on the day when the holder of it had the right, in pursuance of the secretary's call, to receive payment of all then due on it, and that whoever bought them after that day took them as overdue paper, with only such title as his vendors had, and liable to have his title to them disputed and impeached."

Mr. Cohen argued that I was not bound by the reasoning of this judgment, and that it was fallacious, inasmuch as the reason why the purchaser of overdue paper takes no better title than his vendor can give, is not applicable to such a document as a 5-20 bond. He cited *Brown v. Davis* (3 T. R. 80), and *Lloyd v. Howard* (15 Q. B. 995), to show that the doctrine in question is based upon the consideration that the fact that a bill is overdue is in itself a circumstance which ought to put the transferee upon inquiry as to the transferor's title to it : and this he said was the reverse of the truth as to " called " bonds.

The evidence, as he truly stated, showed that they were well known means of transmitting money to America, and that they derived part of their value from the fact that they were " called " or overdue.

I do not feel myself at liberty to consider this question. The bonds in question are American documents, dependent for their whole value on the view taken of them by the

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1884. American Court, to which the American Government refers questions arising upon them, and I therefore think I am bound to take the decision of the American Court as decisive not only as to the right to these individual bonds, but also as to the law relating to them, as expressed above. In other words I must hold that the plaintiff bought from the defendants, not instruments to which a good title could be made by mere delivery, but bonds to which the defendants could make no title.

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This raises the question whether there was an implied warranty of title, and whether the plaintiffs could recover as for a total failure of consideration.

First, as to total failure of consideration, I do not think this can be said to have taken place apart from the defect in title. A failure of consideration arises, where the thing bargained for, is not delivered; such is the case if a forged document is sold instead of a genuine one: *Westropp v. Solomon* (8 C. B. 345); or a Guatamela Bond, not recognized by the government as binding, for one which is so recognized: *Young v. Cole* (3 Bing. N. C.); or a bill purporting to be drawn abroad, and so to be a foreign bill, which was in fact drawn in London and was so unavailable for want of a stamp: *Gompertz v. Bartlett* (2 E. & B. 849; 23 L. J. Q. B. 65).

In all these cases the thing delivered was not the thing sold. In this case the plaintiff got what he bargained for—merely 5·20 bonds. His complaint is that he got a bad title to them, and so could not get them cashed.

I come, therefore, to the last question in this case, which is whether they were sold with an implied warranty of title?

The law upon the subject of an implied warranty of title in the case of personal chattels has been the subject of many decisions and of a good deal of controversy. The subject is fully examined and the history of the changes in the law is treated in Benjamin on Sales, Book IV., Part II., chap. 1, sec. 2, which deals in particular with the cases of *Morley v. Attenborough*, 3 Exch. 500; and *Eichholz v. Bannister*, 17 C. B., N. S. 708; and other cases decided upon them. The view of the law there stated by Mr. Benjamin appears to me to be correct. His view is that the cases examined establish the rule that "A sale of personal chattels implies an affirmation by the vendor that the chattel is his, and therefore he warrants

the title unless it be shown by the facts and circumstances of the sale that the vendor did not intend to assert ownership, but only to transfer such interest as he might have in the chattels sold." It appears to me that the words "personal chattels" are too narrow, and that the principle will apply equally to all sales of personal property, including such instruments as those now in question, although it would of course be subject to all rules of law which may affect the transfer of and title to negotiable instruments. I may add that even in *Morley v. Attenborough*, which preserves so carefully the old law, or what was supposed to be the old law, as to the maxim *caveat emptor*, it is said that with respect to "executory contracts of purchase and sale, where the subject is unascertained and is afterwards to be conveyed, it would probably be implied that both parties meant that a good title to that subject should be transferred in the same manner as it would be implied under similar circumstances that a merchantable article was to be supplied."

These rules I now proceed to apply to the present case. In the first place, what was the mode of dealing pursued by the parties? It was described by Mr. Raphael, who was amply confirmed by two other witnesses, of much experience, as follows; where a foreign banker wishes to make remittances to America, the buyer and seller arrange a price between themselves, at per dollar. The seller sends either bonds or coupons, or both, to the amount agreed upon, and is paid the stipulated price on delivery, the buyer satisfying himself as to the amount represented by the documents delivered. The contract is not for any particular bonds, and in many cases it is left to the option of the seller to deliver bonds, or coupons, or both. Such a contract is an executory agreement, and not a bargain and sale. It seems, therefore, to fall within the suggestion of Parke, B., in *Morley v. Attenborough*.

I think, however, that in regard to executory contracts, as well as in regard to the bargain and sale of personal chattels, an absolutely fixed rule cannot be laid down; an implied warranty of title may, I think, in all cases be rebutted by circumstances. Suppose an executory agreement between A. and B. that B. is to sell to A. at a price goods which B. is to buy at a sale by auction of unredeemed pledges. In

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such a sale there is, as appears by *Morley v. Attenborough*, no warranty of title to B. If A. knows what B. is to buy at such a sale, why should B. be regarded as giving a warranty, which to A.'s knowledge he is not in a position to give? Now in this instance there are circumstances of the greatest weight to be considered. The bonds in question are well-known securities; they are habitually used for the purpose of making remittances to America of the sums which they represent; and it is practically impossible for those who deal in them to know their past history; notwithstanding all these considerations, and notwithstanding the obvious difference between overdue commercial paper, which is discredited by the very fact that it is overdue, and bonds, which the United States Government have decided to pay with interest, up to, but not beyond, a specified date, a circumstance which is so far from discrediting them, that it gives them all over the world a character similar to that of bank-notes, payable at the United States Treasury, the Court of Claims has held that after the maturity of the "call," those bonds cease to pass like cash from hand to hand, and become liable in the holder's hands to any infirmity in the seller's title. It is not my business to express any opinion on the merits of this decision. It must be taken as decisive of the character of the documents; but the question is as to its effect upon the contract between the buyer and the seller of the bonds in England.

And I think it is as follows:—The contract between the plaintiff and the defendant was an executory contract for the sale of bonds, to which the seller could by the act of delivery give no better title than he had. Neither buyer nor seller actually knew that this was the law of the United States; nor indeed could they know it at the time of the sale, because the point was then undecided; but I do not think that this makes any difference: they dealt with American securities, the character of which was determinable in case of need by American law. The contract of the parties must accordingly be construed, as if it had been made with a reference to that law as subsequently declared.

But if such a contract had been made, if the buyer had known that the seller gave him such title only as he himself possessed, he would merely not have accepted the bonds, as if

their mere delivery gave an absolute title to them: he would either have required a warranty of title, or an abatement in the price, to cover the risk. It is, indeed, obvious that all the parties to the transaction in fact treated the bonds as equivalent to so many dollars at the market price of dollars; but this implies either a title by delivery, or a warranty of title. In short, I see nothing to take the case out of what must now be regarded as the general rule as to warranty of the title in sales, and particularly on executory sales of personal property. There must, therefore, be judgment for the plaintiff for 728*l.* 7*s.* 11*d.* and costs, and interest on that amount, at 6 per cent., from 30th October, 1879.

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RAPHAEL AND
SONS
r.
BURT & CO.

Travers, Smith & Braithwaite.

Hollams, Son & Coward.

SMITH, J.

WHITING *v.* EAST LONDON WATERWORKS CO.

1884.
July 4.

THIS was an action to recover damages against the defendant company for having cut off the supply of water from the plaintiff's premises, and to recover back certain sums paid by the plaintiff under protest, in excess, as was alleged, of the sum which the defendants were entitled to charge him for the water rate.

Where a dispute has arisen as to the amount of the water rate payable by an occupier of premises to a water company (whose special Act incorporated the Waterworks Clauses Act, 1847), the determination of the annual value of the premises supplied by two justices, under sect. 68 of the Act of 1847, is a condition precedent to the right of the occupier to sue the company for cutting off the water, and for the amount alleged to have been paid in excess.

The plaintiff was the tenant and occupier of Nos. 3 and 4, Essex Villas, Lea Bridge Road, in the county of Essex. These two houses were connected together, and for the whole premises he paid a rent of 65*l.* a year. The defendant company are incorporated under private Acts of Parliaments, 16 & 17 Vict. c. 166, and 30 & 31 Vict. c. 148, the former of which Acts, incorporated 10 & 11 Vict. c. 17 (the Waterworks Clauses Act, 1847). The plaintiff's premises were situated in the district to which the defendants were empowered to supply water.

The plaintiff became dissatisfied with the assessment of the annual value on which the rate was based, and in March, 1883, paid the amount demanded by the defendants for the rate up to Christmas, 1882, under protest, the defendants having

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 v.
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 Co.

threatened to cut off the supply of water. In August, 1883, the defendants demanded in respect of the two quarters ending at midsummer, 1883, a sum of 2*l.* 4*s.*, assessing the annual value of the premises at 72*£*, 5 per cent. on which made 3*l.* 12*s.*, and charging 16*s.* per annum for three water-closets. The plaintiff disputed his liability to be rated on this footing, contending that he was not liable to pay at all in respect of the water-closets, and only on an annual value of 60*l.* in respect of the houses. On October 17, 1883, the plaintiff offered to pay the defendants the sum of 2*l.* 5*s.*, based on the annual value of 60*l.* for the three quarters up to Michaelmas, 1883. This offer the defendants did not accept, and on the 19th of October, 1883, they cut off the supply of water to the plaintiff's premises.

The material sections of the Acts of Parliament are set out below.*

Bigham, Q.C., and J. Lee Roberts, for the plaintiff.

The defendants had no right to cut off our water supply

* 10 Vict. c. 17, s. 53. Every owner and occupier of any dwelling house, or part of a dwelling-house, within the limits of the special Act, shall, when he has laid such communication pipes as aforesaid, and paid or tendered the water-rate payable in respect thereof, according to the provisions of this and the special Act, be entitled to demand and receive from the undertakers a sufficient supply of water for his domestic purposes.

Section 68. The water-rates, except as hereinafter and in the special Act mentioned, shall be paid by, and be recoverable from, the person requiring, receiving, or using the supply of water, and shall be payable according to the annual value of the tenement supplied with water, and if any dispute arise as to such value, the same shall be determined by two justices.

Section 74. If any person sup-

plied with water by the undertakers, or liable as herein, or in the special Act provided to pay the water-rate, neglect to pay such water-rate at any of the said times of payment thereof, the undertakers may stop the water from flowing into the premises in respect of which such rate is payable, by cutting off the pipe to such premises, or by such means as the undertakers shall think fit, and may recover the rate due from such person, if less than twenty pounds, with the expenses of cutting off the water, and costs of recovering the rate, in the same manner as any damages for the recovery of which no special provision is made, are recoverable by this or the special Act, or if the rate so due amount to twenty pounds or upwards, the undertakers may recover the same, with the expenses of cutting off the water, by action in any court of competent jurisdiction.

after a *bonâ fide* dispute as to the assessment had arisen. Their proper course was to have applied to the justices to have had the dispute determined under sect. 68 of the Waterworks Clauses Act, 1847: They cited *The New River Company v. Mather*, L. R. 10 C. P. 442.

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Webster, Q.C., and *R. S. Wright*, for the defendants.

We were under no contract to supply water to the plaintiff. The plaintiff is only entitled to a supply on complying with the provisions of sect. 58 of the Act of 1847. This he has not done; and we were entitled to cut off his supply under sect. 74 of that Act. *The New River Company v. Mather* only decided that the determination of the proper assessment by the justices was a condition precedent to the company's right to sue. They cited *The Hoddesdon Gas & Coke Co. v. Haselwood*, 28 L. J. C. P. 268; 6 C. B. N. S.

Bigham, Q.C., in reply. Under sect. 74 of the defendant's special Act of 1858, they were under a statutory obligation to supply the water.

SMITH, J.—The question in this case is whether the defendants were entitled to cut off the water supply before they have had a *bonâ fide* dispute as to the assessment of the premises determined by the justices. Whether the defendants would have been so entitled, had they been obliged to resort to sect. 74 of the Act of 1847, it is unnecessary to decide. Mr. Webster's contention is that the defendants had entered into no contract to supply water to the plaintiff, and that, under sect. 58 of the Act of 1847, the defendants were not bound to supply water to the plaintiff unless he tendered in advance the amount they demanded. (His lordship read sect 58, and continued.) The plaintiff, not having tendered the amount at which the defendants assessed the rate up to Christmas,

16 & 17 Vict. c. 166, s. 74. That the company shall, at the request of the owner or occupier of any house, or of any part of a house occupied as a separate tenement, in any street within their limits, in which any main or service pipe of the company is, or shall be, laid, or of any person who under this Act shall be entitled to demand a supply of

water for domestic purposes, furnish to such person by means of communication pipes and other necessary and proper apparatus to be provided, laid down, and maintained, at the cost of such person, a sufficient supply of water for his domestic purposes at a rate per centum per annum on the annual value of the house, not exceeding five pounds.

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1888, is not within that section. Mr. Bigham relies on a statutory obligation created by sect. 74 of the Act of 1853 ; but that section deals with the rate payable by a person entitled to a supply of water, and does not compel the defendants to supply the water to any person who has not tendered the sum demanded in advance. The case relating to gas cited by Mr. Webster, is valuable by way of analogy as showing that there is no contract to supply the water absolutely. I therefore think that the plaintiff cannot maintain this action against the defendants for cutting off his supply of water, nor can I deal with the question as to whether the plaintiff has been charged too much. To determine that, resort must be had to the justices, who are the proper tribunal.

Judgment for the defendants.

Wild, Browne & Wild.

Bircham & Co.

HUDDLESTON, B.

EDMUNDS v. WALLINGFORD.

1884.

July 8.

The goods of A. were seized in execution, and sold, upon a judgment obtained against B. B. subsequently promised to pay monies to A. in consideration of such seizure and sale. Held, that the law would imply a request by B. to permit the seizure and sale, and that there was a good consideration to support B.'s promise.

THIS was an action by a trustee in bankruptcy to recover money alleged to be due under an agreement.

In October, 1878, the Mutual Society recovered judgment against the defendant for several thousand pounds, and the sheriff seized certain stock on the premises of Wallingford, Brothers, of Andover, ironmongers (sons of the defendant), in execution thereof. These goods were claimed by the sons, but on the sheriff interpleading, an order was made at chambers, "that the claimants be barred." The goods were sold by the sheriff, and the proceeds, 1900*l.*, paid into court to abide the taking of mortgage accounts between the Mutual Society and the defendant.

In November, 1878, Wallingford, Brothers, were adjudicated bankrupt, and the plaintiff was appointed trustee in bankruptcy. On May 8, 1879, the following agreement was entered into between the plaintiff and the defendant :—

"I, John Wallingford, of 22, Chelsea Road, Southsea,

hereby agree with H. W. Edmunds, of Summer Row, Birmingham, as trustee in bankruptcy of my sons, that in consideration of their ironmongery stock in and about their shop and premises, at High Street, Andover, having been seized and sold on behalf of the Mutual Society, of Ludgate Hill, London, in payment of an alleged claim against me, I undertake and agree that, in the event of my succeeding in an action I am about to bring against the Mutual Society, to pay all the trade creditors of my sons while in business at High Street, Andover, in full, through the trustee, H. W. Edmunds: and further, I agree that, whether my said action against the Mutual Society is successful or not, I will pay 300*l.* per annum to the said trustee until I shall have paid him a sufficient sum to pay the trade creditors of my aforesaid sons in full.

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“JOHN WALLINGFORD.”

Under this agreement, the defendant had paid nothing.

R. H. Collins, Q.C., Johnston Watson, and C. J. Edwards,
for the plaintiff.

Finlay, Q.C., and W. B. Allen, for the defendant.

HUDDLESTON, B.—The question is, was there any consideration for the agreement? Now, it is clear that as against the father, his sons' goods have been seized to pay his debts, I think that a request must be implied on the father's part to permit the goods to be seized, and that there is therefore good consideration for the agreement, and that the plaintiff may recover on it.

It has been argued that the plaintiff is estopped by the interpleader order barring the sons' claim, from alleging that the goods belonged to the sons; but it is clear that the interpleader order only operates as an estoppel against the execution creditor, and not as against the father.

Judgment for the plaintiff.

Stokes & Robinson.

Purkis & Co.

MATHEW, J.

ROBERTS *v.* BARNARD.

1884.

October 27.

In an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable, where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through, are the full amount of the commission which he would have earned.

THIS was an action in which the plaintiffs claimed commission in respect of their employment by the defendants to effect a sale of certain ground rents, and in the alternative damages arising from the defendants wrongfully refusing to complete the sale with an intending purchaser procured by the plaintiffs.

The agreement was in the following terms :—

“ We hereby agree to allow you as commission one half-year's purchase upon such amount as Messrs. Rooke & Sons, or any other party to whom you may introduce us may purchase; and we hereby authorize such purchaser's solicitor to retain the same out of the purchase-money on your account.

“ H. JOHNSON.

“ H. E. CHILDS.”

The plaintiffs incurred expenses in advertising, and otherwise, and procured one Marks, whose offer to purchase the rents at nineteen years purchase was accepted by the defendants. Marks was willing to complete the purchase, but on his solicitor's objecting to a clause in the agreement of sale, which was in fact unreasonable, the defendants refused to complete the sale.

Charles, Q.C., and J. Robins, for the plaintiffs.

Crump, for the defendants.

MATHEW, J.—The plaintiffs on the true construction of the agreement are not entitled to commission, as the purchase was never completed. They are, however, entitled to damages, as a compensation for the commission which they would have earned but for the wrongful conduct of the defendants; and the measure of damages in this case, where there was nothing more to be done by the plaintiffs to earn

their commission, if the purchase had been completed, is the full amount of commission which they would have earned.

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ROBERTS

v.

BARNARD.

J. H. Hortin.

Russell, Son & Scott.

DENMAN, J.

GREBERT BORGUIS v. NUGENT.

1884.

October 28.

THIS was an action for breach of contract by the defendant to deliver to the plaintiff in Paris 243 black and white sheepskins from the month of February to July, 1883, inclusive. The defendant knew at the time the contract was entered into that the plaintiff was buying for the purpose of resale to a customer at Paris: and a contract of resale was finally effected at a profit of five francs per skin as soon as the plaintiff had completed his contract with the defendant. Only forty-two sheepskins were delivered. These skins were not procurable at this time in the market anywhere. The plaintiff was sued by his sub-contractor in Paris for damages for breach of his (the plaintiff's) contract. The plaintiff defended this action, but was ordered by the French Court to pay, and had paid 28*l.* damages and costs.

A vendor of goods knew at the time of entering into a contract that the purchaser was buying for the purpose of resale to a specific customer. The vendor failed to deliver a large portion of the goods. Held, that the purchaser was entitled to recover the profits he would have made on the resale, and the damages he had to pay to his sub-purchaser.

Horne Payne, and *C. S. Bower*, for the plaintiff.

Finlay, Q.C., and *Griffin*, for the defendant.

The following cases were cited: — *Elbinger, Actien Gesellschaft v. Armstrong*, L. R. 9 Q. B. 473; *Borries v. Hutchinson*, 18 C. B. N. S. 451; *Dunkirk Colliery Co. v. Lever*, L. R. 9 Ch. Div. 201; *Thol v. Henderson*, L. R. 8 Q. B. D. 451; *Hydraulic Engineering Co. v. McHaffie*, L. R. 4 Q. B. D. 670.

DENMAN, J.—(After disposing of a defence that the contract was not an absolute one, but conditional, on the skins turning out sufficiently white for the plaintiff's purpose, and finding that the contract was an absolute one)—proceeded: As to the measure of damages, I think that in this case,

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inasmuch as the defendants were aware that the goods were being bought for a specific purpose, and for a customer with whom the plaintiff was at the time of this contract in the act of contracting, that the profit of five francs per skin which the plaintiff would have made on the resale, is recoverable. This case is within the principle of *Borries v. Hutchinson* (18 C. B. N. S. 45), and is distinguishable from *Thol v. Henderson* (L. R. 8 Q. B. D. 457), which only decided that a mere general knowledge on the part of a defendant that goods were bought for the purpose of resale generally was not sufficient to entitle a plaintiff to recover for a loss of profit. As regards the damages incurred by the plaintiff in the French action, I think he is entitled to recover these in this action. These skins were not procurable anywhere else at this time. The defendant must, therefore, have known that his breach would prevent the plaintiff from fulfilling his sub-contract; and I think it reasonable in assessing the plaintiff's loss to include these damages as a reasonable consequence of the defendant's breach. See *Elbinger, &c. v. Armstrong* (L. R. 9 Q. B. 473). As to the costs, however, I cannot make the defendant pay to the plaintiff costs incurred by the latter in defending an action to which there was really no defence.

A. Selim.

A. Poland.

MATHEW, J.

WEBSTER & CO. AND ANDERSON & CO. v. BOND
AND STOREY.

1884.

October 29.

Where a lighter was let out "without risk of craft", and the goods on board were damaged by sea-water. Held, that the owner of the lighter was not liable for the loss.

THIS was an action brought to recover a sum of 112*l.* 9*s.* 6*d.*, the amount of damage done to certain cases of silk.

The plaintiffs, Anderson & Co., having agreed with the plaintiffs, Webster & Co., to convey the cases in question from Brewer's Wharf to Gravesend at Webster & Co.'s risk, hired a lighter with a man from the defendants, for the purpose of the conveyance of the cases. Lightermen have two rates of charges when letting out their lighters; the one, a

higher rate, which includes risk of craft; the other, a lower rate, without risk of craft. On this occasion the hiring was on the lower rate. The lighter, when the cases were put on board, was fastened alongside a steam tug employed by Anderson & Co., by order of the captain of the tug, for the purpose of being towed down to Gravesend. During the passage, the cases were much damaged by water, coming probably (as the evidence showed) from the paddle wheel of the tug. The lighterman accompanying the lighter, during the passage stepped from the lighter on to the tug, and stayed there for a considerable time, and until the tug and lighter arrived at Gravesend, when the damage was first discovered.

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WEBSTER & Co.,
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Finlay, Q.C., and *Hollams*, for the plaintiffs, contended that the defendants were liable for the consequences of the negligent conduct of the lighterman in not stopping on board the lighter. If he had done so, it would have enabled precautionary measures to have been taken, by slackening speed or otherwise, when the water began to come into the lighter.

Bray, for their defendants, contended that their only obligation was to furnish a lighter tight and staunch, and this had been done.

MATHEW, J.—I think the words “without risk of craft” mean without risk or liability to the owner of the craft in respect of the carriage of the goods. There must, therefore, be judgment for the defendants.

Hollams, Son & Coward.

Rollit & Son.

DENMAN, J.

1884.

October 29.

LOWES v. MAUGHAN AND FEARON.

A surety guaranteed payment of the premiums upon a life policy, which had been assigned by the principal debtor to his creditor to secure payment of part of the debt. Subsequently, the creditor, without the knowledge of the surety, agreed with the debtor to take the security and the liability of the debtor and surety to pay the premiums thereon in substitution for the personal liability of the debtor, in respect of that portion of the debt, and released the debtor from personal liability in respect thereof. Held, that this arrangement discharged the surety.

THIS was an action against an executor, and a surety on a guarantee.

R. O. B. Lane, for the plaintiff.

Morshead and Cock, for the defendant Fearon.

Bradford, for the defendant Maughan.

The facts and arguments fully appear in the judgment of the learned judge.

In addition to the authorities referred to in the judgment the following cases were cited:—*Croydon Gas Company v. Dickenson*, L. R. 2 C. P. D. 51; *Holme v. Brunskill*, L. R. 3 Q. B. D. 495; *Pledge v. Bass*, Johns. 663.

DENMAN, J.—This was an action against two defendants, Maughan and Fearon, the claim against Maughan being upon a covenant in a deed which made him liable to the plaintiff, provided the plaintiff had to pay the premiums on a certain life policy. As regards Maughan, it really was an undefended case, and I gave judgment for the plaintiff as against Maughan for 37*l.* and costs. The action as against Fearon was against him as a guarantor upon a guarantee, and the general nature of the defence was, that by reason of transactions between the creditor and the debtor he was discharged.

October 31

The facts as against Fearon were as follows, so far as it is necessary to state them:—One Pawle, who was a partner of Fearon, owed the plaintiff, Lowes, 2,500*l.* Pawle happened to possess, as assignee, a policy on the life of one, Walker, for 1,500*l.*, and by a deed of the 27th February, 1882, he (Pawle) mortgaged to Lowes, the plaintiff, that policy of insurance. The mortgage deed contained a covenant on the part of the debtor to pay the premiums, and the mortgagee had a right to pay the premiums if they were not paid by the mortgagor, and to recover them from the mortgagor.

On the 17th April, 1882, the defendant, Fearon, gave the guarantee upon which he is sued in this case, and that guarantee was as follows:—"I hereby become liable and

responsible to you for the due performance of the covenant on the part of John Christopher Pawle, of this address, for payment of premiums upon Walker's life of 34*l.* 18*s.* 9*d.* contained in the mortgage bearing date the 27th of February, 1882, and made between Pawle of the one part and yourself of the other part." The consideration for that guarantee was, it was admitted by Mr. Lane, not quite accurately stated in the statement of claim. The way in which he puts the consideration upon it, when asked by me how he stated it—and it may be taken for the purpose of this case that it is so put upon the pleadings—is, that the plaintiff would, instead of proceeding to call in the principal debt, acquiesce in its remaining outstanding, on the defendant guaranteeing the payment of the premiums on the policy mentioned in the mortgage deed.

Now, what further happened was this, that on the very next day, the 18th of April, the mortgagor, the plaintiff, released by a deed endorsed upon the original mortgage the liability of the debtor in respect of everything, except in respect of the mortgage upon the policy itself.

These were the terms of the release.

It was made on the 18th of April, 1882, between Lowes and Pawle, and it witnessed that in consideration of the undertaking of Fearon, whereby Fearon guaranteed the due performance of the covenant on the part of Pawle for the payment of the premiums, Lowes doth hereby for himself, his heirs, executors, administrators, and assigns, release and discharge Pawle both from personal liability for, and in respect of, all principal moneys and interest secured by the said written indenture. Then it provides that the policy and premiums, or any new policy and premiums, in the indenture mentioned should extend to, and be chargeable in, the security for the principal moneys and interest in the within-written indenture mentioned.

Now, it was admitted that the defendant Fearon was no party whatever to that release, and it was admitted, indeed, that, until about a year afterwards, he never heard of it or knew of it. It was not suggested that this was a fraudulent concealment, probably because it may be taken that the parties fancied that they had a right to do it, and did it for better or for worse, under the impression that they were doing a right

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certainly stand in a worse position by reason of the release of the personal liability of the debtor for payment of the very money which formed the consideration for the covenant, the performance of which the surety guaranteed.

It seems to me to be enough to put it in this way. If one were putting it to a jury, whether such an alteration as that were material, no jury in the world, I think, would say that it was the least certain or the least probable, that the surety would have entered into the contract he entered into, if he had known at the moment that the very next day the person who owed the money would be released from his liability to pay the money, and that he would have thrown upon him only the liability existing for the payment of the premium in respect of a debt which, as between the principal debtor and the creditor, would then have ceased to exist.

Upon the facts of this case, therefore, I hold that the surety is discharged. I do not think it necessary to deal with the argument that the surety would be entitled to stand in the place of the principal debtor, and to have the security given up to him on payment by him of the debt. I think it would be so; and I think probably on that ground, the case would also have to be decided in favour of the surety. But it is not necessary to decide that. I think that the facts that have occurred clearly show an alteration in a material particular, which if it had existed at the moment at which the guarantee was given, the guarantee never would have been given; and that not only is it possible that it would prejudice, but that it is likely that it would prejudice the position of the surety, and therefore on that principle the case ought to be decided in favour of the defendant.

I therefore give judgment for the defendant Fearon, with costs, and judgment as against Maughan for 37*l.* and costs.

C. J. Lowes, Junr. W. H. Roberts. J. J. Griffenhoof.

DENMAN, J.

BLAKE *v.* HUMMEL.

1884.

October 31.

THIS was an action on a solicitor's bill, and the question was, whether the bill was a bill of fees, charges, and disbursements, within the meaning of 6 & 7 Vict., c. 73, s. 37. The bill was in the following form:—

The REVD. F. H. HUMMEL,
to
EDWARD F. BLAKE.

1881.

October. Perusing abstract of the title to Wilcot Lodge, Shanklin. Instructions for requisitions on the title, and drawing same, and fair copy. Perusing Mr. Harper's replies thereto. Instructions for assignment. Drawing same, and fair copy for perusal. Engrossing same, and journey to London to examine the abstract, and completing purchase, including attendance and correspondence with you and Mr. Harper, and Messrs. Dean and Taylor, including travelling and hotel expenses

£ s. d.

38 10 0

1882. Paid stamp parchment plan . . .

9 0 0

April 7. Yourself *ats.* Urry—attendance on you in reference to this case, on which you were summoned for an assault, and conferring thereon, and receiving your instructions to attend the petty sessions on the hearing of the case, and attending accordingly on your behalf, where the magistrates considered an assault had been committed, and fined you in the penalty of

2s. 6d., and costs 2 2 0

Paid penalty and costs 0 9 6

A solicitor may recover in respect of the items in a bill of costs which disclose the fees, charges, and disbursements with sufficient particularity, although other items in the bill are wanting in such particularity, and cannot therefore be recovered.

DENMAN, J.

CRONIN v. ROGERS.

1884.

October 31.

A notice, requiring a tenant to remedy a breach of covenant by repairing premises within three months, expired on Feb. 1st, 1884. No repairs were then done, and on Feb. 2nd, the rent due at Christmas, 1883, was accepted. Held, that the acceptance of the rent was no waiver of the breach of covenant.

An assignee of a lease is a "lessee" within the meaning of sect. 14, sub-sect. 1, of the Conveyancing Act, 1881. A notice, under sect. 14, sub-sect. 1, of the Conveyancing Act, 1881, addressed to A. B. (the original lessee), and "all others whom it doth or may concern," and served on the persons in occupation of the demised premises, is sufficiently addressed to, and validly served on, the assignee of the lease.

THIS was an action by a landlord to recover possession of certain houses, under a lease granted in 1824, giving him the right to re-enter for breach of a covenant to keep the said houses in repair. The defendant was the assignee claiming through the original lessee (one Richard Ness). In October, 1883, the premises were out of repair, and on the 31st of that month, notices addressed to "Mr. Richard Ness and all others whom it doth or may concern," and complaining of the breaches and requiring the same to be remedied within three months were served on the premises, which were in the occupation of tenants, and were by them duly forwarded to and received by the defendant. At the expiration of the three months, on Feb. 1st, 1884, no repairs had been done to the premises. On Feb. 2nd, the rent in respect of the premises up to Christmas, 1883, was paid by the defendant to and accepted by the plaintiff's agent. On Feb. 15th this action was brought, the premises being still out of repair.

Channell for the plaintiff referred to sect. 14, sub-sect. 1, and sect. 67, sub-sects. 2 and 3, of 44 & 45 Vict. c. 41 (The Conveyancing Act, 1881).*

* *Section 14, sub-sect. 1.* A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the

breach.

Section 67. (2) Any notice required or authorized by this Act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained.

(3) Any notice required or authorized by this Act to be served shall be sufficiently served if it is left at the last known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other

Wheeler, for the defendant.—The defendant is not a lessee within the meaning of the Act, and neither the form of the notice nor the service thereof was, under the circumstances, good. Further, the acceptance of rent on the 1st February was a waiver of the breach in respect of which this action was brought.

DENMAN, J.—The defendant was a lessee within the meaning of the Act; and it would defeat the object of the Act to confine the word lessee to the original lessee. I also think that the notices were in proper form and validly served, and that the acceptance of the rent up to Christmas neither waived the breach, nor invalidated the notices. There must be judgment for the plaintiff.

A. C. Cronin.

Woodbridge & Son.

MATHEW, J.

JUPP *v.* POWELL.

1884.

CRONIN
v.
ROGERS.

1884.

November 3.

THIS was an action for goods sold and delivered. The defendant pleaded the Statute of Limitations.

The plaintiff, who carried on business in England, had been in the habit of supplying the defendant, who was a master mariner, residing sometimes in England, sometimes abroad, with goods on a running account extending over several years, from Dec., 1871, to April, 1876, the defendant making occasional payments on account. On the 18th of April, 1876, there was owing to the plaintiff on this account the sum of 52*l.* 11*s.* 11*d.*, the sum sued for in the action.

The plaintiff proved that he regularly sent to the defendant, who, about this time, was resident in India, his account each half-year, in December and June of each year; that he saw

person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or

building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

you ought to know me by this time. When I have had the means, you have got luck." Held, not a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations.

A letter from a debtor to his creditor contained the following expressions: "I was in hopes of being able to send you some coin by small instalments, but as I have been ordered home, the matter must be in abeyance a little longer, which won't ruin you. I know you must live in hopes as I do, for a good time is rather long coming. . . . I can assure you such behaviour would not induce me to put myself out to attempt to square off your account. I think

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the plaintiff in England in June, 1877, who told him that he could not at that time do anything towards settling the claim, but that he would do so when in receipt of money.

Early in 1878 he received the following letter from the defendant, dated 3rd Dec., 1877, written from Bagdad:—

“I was in hopes of being able to send you some coin by small instalments, but as I have been ordered home, the matter must be in abeyance a bit longer, which won't ruin you. I know you must live in hopes as I do for a good time is rather long coming. I hope your son has not made himself officious by going to my employer and making inquiries about me and my affairs, because if he has I shall be annoyed very much indeed, and I can assure you such behaviour would not induce me to put myself out to attempt to square off your account. I think you ought to know me by this time; when I have had the means you have pot-luck, whether from India, the West Coast of Africa, or at home.”

This letter, the plaintiff proved, must have been written by the defendant after receiving the June account, 1877.

The writ was issued within six years from the date of this letter.

McCall, for the plaintiff, contended that this letter was a sufficient acknowledgment to prevent the Statute from operating. It referred to the account, and, though not a promise to pay the debt unconditionally, the promise would be implied.

[*MATHEW, J.*—But the letter was not a promise to pay at all. Suppose in the letter the defendant had actually expressed his intention not to pay?]

McCall.—It was at all events a conditional promise to pay when in receipt of funds.

Francis Turner, for the defendant.

MATHEW, J.—I am of opinion that my judgment must be for the defendant. This letter is clearly not an acknowledgment of the debt within the meaning of the Statute.

Judgment for the defendant.

James Curtis.

Miller, Smith & Bell.

Ex rel. M. Lush.

"Now, first of all, the acknowledgment must be clear, in order to raise the implication of a promise to pay. An acknowledgment which is not clear will not raise that inference. Secondly, supposing there is an acknowledgment of a debt, which would, if it stood by itself, be clear enough, still, if words are found combined with it which prevent the possibility of the implication of the promise to pay arising, then the acknowledgment is not clear within the meaning of the definition; because, not merely is there found in the words something that expresses less than a promise to pay (which, as Lord Bramwell pointed out in *Lee v. Wilmot* (L. R. 1 Ex. 364, 367), will not necessarily put an end to the implication of the promise to pay), but because the words express the lesser in such a way as to exclude the greater." Per Bowen, L. J., in *Green v. Humphreys*, L. R. 26 Ch. Div. 479, 480.

1884.

JUPP
v.
POWELL.

GROVE, J.

CURTIS v. WAINBROOK IRON COMPANY.

THIS was an interpleader issue directed to try the right to a sum of 70*l.*, the proceeds of sale of certain goods seized and sold by the sheriff of Poole.

The Wainbrook Iron Company having recovered judgment against one Lewin, the sheriff seized goods of Lewin's under a writ of *fiery facias* on the 2nd of February, 1884, and sold the goods so seized on the 9th of February. The undersheriff of Poole, one Aldridge, was also a solicitor, and, on or about the 20th of February, while the proceeds of the sale were still in his hands, he was instructed by Lewin to draw up and present a bankruptcy petition against him. The petition was accordingly drawn up by Aldridge, and signed by Lewin, and on the morning of the 23rd of February (a Saturday), Aldridge's clerk filed the petition and returned to Aldridge's offices, and informed him, verbally, about 10 o'clock in the morning, that he had filed it. On the same day a receiving order was made, and late in the afternoon of the same day, the same was shewn to Aldridge's clerk, and he was informed that the official receiver claimed the proceeds of sale. In March Lewin was adjudicated a bankrupt on the petition herein-before mentioned, and the plaintiff was appointed the trustee in his bankruptcy. The trustee claiming the proceeds of sale, as well as the Wainbrook Iron Company, the sheriff interpleaded, and this issue was directed.

1884.

November 4.

The notice to be served on a sheriff of a bankruptcy petition having been presented against, or by, the debtor, under sect. 46, sub-sect. 2, of the Bankruptcy Act, 1883, need not necessarily be in writing.

1884.

CURTIS

v.

WAINBROOK
IRON COMPANY.

*Foot*e, for the plaintiff, contended that the notice required by sect. 46, sub-sect. 2 of 46 & 47 Vict. c. 52 (The Bankruptcy Act, 1889),* need not be in writing, and that even if writing was necessary the shewing of the receiving order was a sufficient notice in writing.

Trevor White, for the defendants, contended that no proper notice had been served on the sheriff. He relied on rule 11 of the Bankruptcy Rules, 1889.†

GROVE, J.—The 14 days required by sect. 46, sub-sect. 2, means 14 full days, and, therefore, notice might be given at any time on the 23rd of February. Both the notices given on that day were good. I do not think a written notice is necessary, and rule 11 applies, in my opinion, to official notices and proceedings in respect to Court matters, and not to notices of this kind. It is very observable that rule 11 is among rules that deal with Court Procedure. It was, therefore, unnecessary that any such idle formality should be gone through as that Aldridge should serve a written notice on himself, or that Aldridge's clerk should serve a written notice on his employer. I think the conclusion at which I have arrived is fortified by the words "or on any other petition of which the sheriff has notice," as it seems clear that notice there cannot mean "written notice."

Peacock & Goddard.

Prior, Bigg & Co.

* *Section 46, sub-sect. 2.* "Where the goods of a debtor are sold under an execution in respect of a judgment for a sum exceeding twenty pounds, the sheriff shall deduct the costs of the execution from the proceeds of sale, and retain the balance for fourteen days, and if within that time notice is served on him of a bankruptcy petition having been presented against or by the debtor, and the debtor is adjudged bankrupt thereon, or on any other petition of which the sheriff has notice, the sheriff shall pay the

balance to the trustee in the bankruptcy, who shall be entitled to retain the same as against the execution creditor, but otherwise he shall deal with it as if no notice of the presentation of a bankruptcy petition had been served on him."

† *Rule 11.* All notices required by the Act or these Rules shall be in writing, unless these Rules otherwise provide, or the Court shall in any particular case otherwise order.

STEPHEN, J.

WILLIS, WINDER & CO. v. COMBE.

1884.

November 5.

THIS was an action against a sheriff for not levying on the goods of a judgment debtor under a writ of *fi. fa.*, and for a false return to the writ, in which a question arose as to the liability of the sheriff under the following circumstances.

The plaintiff had obtained on the 5th of April, 1881, judgment against one Edward Scales, for the sum of 521*l.* 13*s.* 7*d.* and 6*l.* 8*s.* costs.

On the 6th of April, 1881, a writ of *fi. fa.* was delivered to the sheriff, who took possession on the evening of the same day.

At that time a receiver appointed under an order of the Court of Bankruptcy was in possession of the debtor's premises (which consisted of a music-hall and public-house), but the sheriff's officer was let into possession notwithstanding. On the 7th of April one Hayes, who held a bill of sale on the goods on the premises, brought a considerable number of men on the premises, who "wrecked" the place, broke open the cellar, and drank and wasted a large quantity of the stores. The sheriff's officer took part in the disturbance, but was ultimately ejected by Hayes. The sheriff obtained the assistance of the police, who quelled the disturbance, and on the 8th of April his officer was reinstated.

On the 6th of May the petition in bankruptcy under which the receiver had been appointed was dismissed.

Willis, Q.C., and *Bremner*, for the plaintiff.—The sheriff having seized, and being in possession before, and at the time of, the disturbance, is liable for the value of the goods so destroyed, even though no negligence on his part be established. The sheriff's duty is higher than that of a bailee. Only the act of God, or the king's enemies, excuse a sheriff for the loss of goods in his possession under a seizure. They cited *Mildmay v. Smith*, 2 Wms. Saunders, p. 789.

Further, there was negligence in this case: the sheriff's officer took part in the disturbance, and omitted to summon

A sheriff is not liable for damage to goods which he has seized under a *fi. fa.* caused by a mob breaking in and injuring the goods, if he has used reasonable care and diligence in protecting them. *Semble*, If a sheriff is let into possession of goods, of which a receiver, appointed by the Court of Bankruptcy is already in possession, he will not be liable in damages for not protecting the goods against third parties.

1884.

PITMAN
v.
FRANCIS.

had sued the defendant and obtained a mandatory injunction, and compelled him to pull down the wall.

McIntyre, Q.C., and Macaskie, for the plaintiff.

Sir H. Giffard, Q.C., and Houghton, for the defendant.

MATHEW, J.—I can see no evidence of negligence in this case. The solicitor was consulted with reference to getting rid of the lessor's objection to the wall; he was shewn the covenant in the lease to the defendant, but nothing was told him to shew him that he was to inquire into the lessor's right to allow the building to be completed.

J. B. Pitman.

A. G. Ditton.

DENMAN, J.

1884.

November 7.

OWENS v. SHIELD.

A. mortgaged leaseholds by underlease to B., to secure 800*l.* A. subsequently agreed to sell the leaseholds to C. for 900*l.* C. paid a deposit of 30*l.*, and agreed to pay the balance of the purchase money payable on a given day. By the agreement 800*l.* of the purchase-money was to be left on mortgage of the property sold. The same solicitors acted for A., B., and C., throughout the matter. A. executed an assignment of the leaseholds to C., and C. entered into possession thereof. Held, that A. was entitled to the 70*l.* balance of purchase-money from C., although no surrender had been obtained of B.'s underlease.

THIS was a garnishee issue, directed to ascertain whether the defendant was indebted to one Tuxill (the judgment debtor of the plaintiff) in any, and what, sum on May 8, 1884.

Tuxill was the lessee for a term of years of two villas at Streatham, these he had mortgaged by underlease to secure 800*l.* to a Miss Blanc. Throughout the transaction hereinafter mentioned Messrs. Saunders, Hawksford, Bennett & Co. acted as solicitors for Tuxill, Mrs. Shield, and Miss Blanc.

By an agreement, made on the 5th of March, 1884, Tuxill agreed to sell, and Mrs. Shield agreed to buy, at the price of 900*l.*, the leases of the two villas, which were held for the term of ninety-nine years from the 25th of September, 1880, at a yearly rent of 8*l.* each, of which sum 80*l.* was on the same day paid by Mrs. Shield to Tuxill's solicitors. The agreement further provided, "The purchase shall be completed on the 25th of March, 1884, when the balance of the purchase-money shall be paid, by which time the vendor agrees to finish and complete the property in all respects fit for habitation, and more especially to make the alterations set out in the schedule hereto. The vendor agrees

to leave 800*l.* on mortgage of the premises, such sum to bear interest at 5 per centum per annum."

1884.

OWENS

v.

SHIELD.

Tuxill performed his part of the agreement, and Mrs. Shield went into possession of the villas in the month of March. The solicitors then prepared a deed of assignment, by which Tuxill assigned his term to Mrs. Shield, and Tuxill duly executed the said deed.

A. T. Lawrence for the plaintiff.—There is 70*l.* still payable by Mrs. Shield to Tuxill: and this sum constitutes an attachable debt.

J. G. Witt for the defendant.—Tuxill was not in a position to enforce payment of the 70*l.* from Mrs. Shield, inasmuch as he had not obtained a surrender of the underlease from Miss Blane. He cited *Howell v. Metropolitan District Railway Company*, L. R. 19 Ch. D. 508, and *Dart on Vendors and Purchasers*.

DENMAN, J.—Everything had been done by Tuxill under the agreement of March 5th to entitle him to be paid the 70*l.* balance of the purchase-money, payable by Mrs. Shield to him under that agreement. There was, therefore, an attachable debt of that amount on May 12th.

Judgment for the plaintiff.

*Newman, Stretton &
Hilliard.*

*Saunders, Hawksford &
Bennett.*

DENMAN, J.

ANGIER BROTHERS v. STEWART BROTHERS.

1884.

November 10.

THIS was an action for balance of freight, brought by the owners of the s.s. *Tangier* against the guarantors of the payment of the hire of the said steamer, as per charter-party entered freight was payable at so much per calendar month, and "at and after the same rates for any part of the month," until her delivery to owners. On the day the hiring terminated she was delivered to her owners at 5.30 p.m. Held, that the charterers were liable for freight for the whole day, commencing at noon of the day of her delivery.

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 ANGIER BRO-
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into between the plaintiffs and Messrs. Byrne & Co., of Mobile, Alabama, U.S.A.

One question involved in the case was, whether under the charter-party there was a liability on the charterers to pay for the hire of the steamer for the whole of the last day on which the steamer was at the charterers' disposal.

By the charter-party, made on the 9th of August, 1883, the owners agreed to let, and the charterers agreed to hire, the said steamship "for the term of about two calendar months from the day she is delivered or placed at the disposal of the charterers, or their agents, at noon of the day she is delivered at Cardiff ready to coal in such dock, or at such safe wharf or place as charterers may direct." It was also provided, that "the charterers shall pay for the use of the said vessel at the rate of ten shillings sterling per gross register ton per calendar month, commencing on the day of delivery at Cardiff as above, and at and after the same rates for any part of the month; hire to continue from the time specified for terminating the charter until her delivery to owners (unless lost) at a port in the United Kingdom, or on the Continent, between Havre and Hamburg."

The steamer made a voyage from Cardiff to Pensacola and back to Liverpool. At Liverpool her cargo was discharged, and she was delivered to the owners at about 5.30 p.m. on the 25th of October, 1883.

J. Edge for the plaintiffs.—We are entitled to be paid for the hire of the vessel for the whole day, which began at noon on the 25th of October. The law will not in such a case take notice of fractions of a day. He cited the *Commercial Steamship Company v. Boulton* (L. R. 10 Q. B. 346).

Gully, Q.C., and *Edwyn Jones*, for the defendants.—We are only liable for a quarter of the day which commenced at noon of the 25th of October. The words of the charter-party are "at and after the same rates for *any* part of a month."

November 15.

DENMAN, J.—On the question as to whether the plaintiffs are entitled to payment in respect of hire for a whole day or only for a quarter of a day, I am of opinion that they are entitled to payment for the whole day which commenced at noon of the 25th of October. There seems to be no authority

on the point, but the case cited by Mr. Edge, which decided that in the case of demurrage a fraction of a day counted as a day, in the absence of express stipulation to the contrary, is somewhat analogous, and supports the view I take. I do not think it would be proper in this case to cut up the day. Under the charter-party, the day commenced at noon, and the quarter of a day succeeding noon might well be the most valuable part of the day.

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 ANGLIER BROTHERS
 v.
 STEWART BROTHERS.

Botterell & Roche.

Kearsey, Son & Hawes.

MATHEW, J.

GOODING v. EALING LOCAL BOARD.

1884.
 November 12.

THIS was an action against the defendants, the Urban Sanitary Authority for the District of Ealing, to recover back certain plans of shops, houses, and a lecture hall which the plaintiff contemplated building in the defendants' district. The plans had been sent to the defendants by the plaintiff, accompanied by a printed notice, stating the plaintiff's intention to erect the buildings of which the plans were sent. This printed notice was supplied by the defendants. At the foot of the notice were the words "See regulations over," and on the back were the words "All plans deposited will be retained in the surveyor's office for record." The plaintiff saw the words "See regulations over," but did not in fact look over. The plans were disapproved of by the defendants; but they refused to send them back, claiming the right to keep them. The plaintiff had frequently signed similar notices and sent in plans before to the defendants, but these had always been approved of and retained by them. In this case the plaintiff, after the disapproval of the plans, sent in fresh ones, which had been approved of and retained by the defendants.

It is reasonable for an urban sanitary authority to make bye-laws and regulations enabling it to retain the plans of intended buildings deposited under the Public Health Act, 1875, although such plans be disapproved of and rejected.

The defendants had made bye-laws in pursuance of sect. 157 of the Public Health Act, 1875 (38 & 39 Vict. c. 55),*

* Section 157. Every urban authority may make bye-laws with respect to the following matters

(that is to say)—

(1) With respect to the level, width and construction of new

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BOARD.

and by the 92nd bye-law they had the power of retaining all plans of intended buildings deposited with them.

Henn Collins, Q.C., and Goddard, for the plaintiff, contended that the rejected plans were his property, and that any bye-law which gave the defendants a power of retaining plans belonging to another person, even although the defendants disapproved of and rejected the plans, was unreasonable.

Lumley Smith, Q.C., and Coward, for the defendants, contended that the plaintiff must be taken to know the terms on which the plans were deposited, and that there was nothing unreasonable in the defendants retaining rejected plans.

MATHEW, J.—In my opinion the defendants are right, and it was within their powers and not unreasonable to make the regulation inserted on the back of the notice. The defendants may very well desire to retain rejected plans, to serve as a record to show what it is they disapprove of in the plans, and why they rejected them. There must be judgment for the defendants.

Peacock & Goddard.

S. Pilley.

streets, and the provisions for the sewerage thereof.

(2) With respect to the structure of walls, foundations, roofs, and chimneys, of new buildings, for securing stability, and the prevention of fires, and for purposes of health.

(3) With respect to the sufficiency of the space about buildings to secure a free circulation of air, and with respect to the ventilation of buildings.

(4) With respect to the drainage of buildings, to water-closets,

earth-closets, privies, ashpits, and cesspools, in connection with buildings, and to the closing of buildings, or parts of buildings, unfit for human habitation, and to prohibition of their use for such habitation.

And they may further provide for the observance of such bye-laws, by enacting therein such provisions as they think necessary as to the giving of notices, as to the deposit of plans and sections by persons intending to lay out streets, or to construct buildings.

STEPHEN, J.

MACLEAN v. CURRIE.

1884.

November 13.

THIS was an action for arrears of rent alleged to be due under a lease for two years of a furnished house let by the plaintiff to the defendant. The defence set up was that the defendant, before the rent became due, had determined the tenancy, as he was justified in doing, by reason of the house having become unfit for occupation, owing to the alleged dangerous state of the plasterings of the ceilings. The evidence showed that before the commencement of the lease, in September, 1883, the plastering of the ceilings in several rooms was cracked and fractured, and that at the end of January, 1884, a considerable portion of the plastering of the drawing-room ceiling fell, and that the rest of the plaster in the room was loose from the laths and liable to fall also; and that at that time the plastering of the ceilings in the dining-room and hall, and first floor rooms was fractured and unsound. The landlord (the plaintiff's lessor) offered to do the necessary repairs of the ceilings, which would have occupied a week or ten days, but the defendant refused to allow him to do so, and claimed the right of determining his lease.

A tenant is not justified in determining a tenancy of a furnished house, because during the term a portion of the plastering of the ceilings (which were cracked and fractured at the commencement of the tenancy) fell in one room, and the plastering of the ceilings in other rooms was unsound and liable to fall. On a letting of a furnished house, the implied term that it shall be fit for human habitation only applies to the condition of the premises at the commencement of the tenancy.

McCall for the plaintiff.

Reid, Q.C., and *C. J. Peile*, for the defendant, contended that the implied condition was that the house should be fit for human habitation at the commencement of, and should so continue throughout the term. They cited *Smith v. Marrables* (11 M. & W. 5; 12 L. J. Ex. 223); and *Wilson v. Finch Hatton* (L. R. 3 Ex. D. 336).

STEPHEN, J.—The implied condition, in my opinion, only applied to the state of the house at the commencement of the term. Further, I do not think the principle of the cases cited applies to the case of the defects complained of here.

DENMAN, J.

1884.

November 13.

ELWELL v. JACKSON.

When a debtor draws a cheque in payment of a debt, which cheque is duly honoured and paid, there is no debt owing or accruing from debtor to creditor between the giving of the cheque and payment thereof. There is no duty upon the debtor who is served with a garnishee order *nisi* between such dates to stop payment of the cheque.

THIS was a garnishee issue, directed to be tried to ascertain whether the defendant was at the time of the service upon him of a garnishee order *nisi* by the plaintiff, indebted to one Wade, against whom the plaintiff had recovered a judgment.

Wade had given to Messrs. Jackson and Evans a power of attorney directing them to sell certain furniture and effects in his house at Hitchin, and they employed the defendant Jackson, an auctioneer at Hitchin, to sell the furniture, &c. Jackson accordingly sold the furniture and effects there on the 19th June, and sent a cheque for 75*l.*, part of the proceeds, to Messrs. Jackson and Evans in London. The cheque was drawn upon bankers at Hitchin, payable to Messrs. Jackson and Evans' order. On the 20th June the plaintiff recovered judgment against Wade, and on the same day obtained and served a garnishee order *nisi* upon the defendant, charging any monies of Wade's in the defendant's hands or any debt owing or accruing from him to Wade. The cheque was paid by Messrs. Jackson and Evans into the National and Provincial Bank in London, and presented at Hitchin and paid on the 23rd of June.

Bompas, Q.C. (with him *Cooper Wyld*), for the plaintiff.—The defendant, upon being served with the garnishee order should have stopped the payment of the cheque. The debt was not discharged by payment by cheque; the remedy only was suspended. *Cohen v. Hale* (L. R. 3 Q. B. D. 371). The debt was bound by the order, and was no longer payable to Wade. Messrs. Jackson and Evans, as agents for Wade, had no authority to receive payment by cheque, and special authority is needed. *Price v. Price* (16 M. & W. 232). He also cited *National Savings' Bank v. Tranah* (L. R. 2 C. P. 556); *Heywood v. Pickering* (L. R. 9 Q. B. 428).

Lumley Smith, Q.C. (*W. S. Robson* with him), for the defendant.—The defendant was not indebted to Wade at the time of the service of the order. See Rules of S. C. 1883, Order XLV. Payment by cheque is good payment, conditional

only on the cheque being honoured (Byles on Bills, 22; *Pearce v. Davis*, 1 M. & R. 365). A creditor who has taken a cheque in payment of a debt may not sue for such debt until the cheque has been presented and dishonoured (Chitty on Contracts, 10th edit., 681). The drawer of a cheque cannot be compelled to stop payment of it at the instance of a third party (*Ex parte Richdale*, L. R. 19 Ch. D. at p. 416, *per Jessel*, M. R.).

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DENMAN, J.—This case raises an important point which lies, nevertheless, within a small compass. The question is raised in garnishee proceedings, and is simply whether, at the time of the service upon him of the garnishee order *nisi*, there was any debt owing or accruing from the defendant to Wade. It is not necessary for me to decide the question whether or not Jackson and Evans had authority from their principal, Wade, to receive payment of the money by cheque, or whether they treated it in fact as payment. That might be a question between them and their principal. My judgment upon this issue must be for the defendant upon the construction of Order XLV. rules 1 and 2, on which the rights of these parties must depend. This is the foundation of the whole proceeding, and, unless there was at the time of the service of the garnishee order *nisi* a “debt owing or accruing,” within the meaning of this order, from Jackson to Wade, my judgment must be for the defendant. Now I agree that the mere giving of a cheque is not necessarily payment of a debt, and that it only suspends the remedy. This is familiar law. But the question is, whether where a cheque has been given for a pre-existing debt which is ultimately honoured, and notice of a garnishee order is served while the cheque is outstanding, is there a “debt owing or accruing” within the proper meaning of those words? I think not. *Cohen v. Hale* (L. R. 3 Q. B. D. 371) is most in point of the authorities which have been cited, but in that case the cheque was ultimately dishonoured. The question arose there at a different date. I think it necessary to put a strict construction upon the words “debt owing or accruing;” and where a cheque is ultimately honoured and money paid on it there is no “debt owing or accruing” while it is outstanding. This is not a *debitum in presenti*, nor was it the duty of Jackson to stop the cheque.

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v.
JACKSON.

It was not a *debitum in futuro*, because no debt can be said to be accruing unless it is certain that it will accrue at some future time. There must be certainty. It has been held frequently that a claim for unliquidated damages is not a debt accruing. If a cheque is ultimately paid, as here, the drawer would have to pay twice over if the money could be attached. The case is one *primæ impressionis*, but the grounds of the decision in *Cohen v. Hale* lead me to think that the decision of the learned judges who decided that case would have been the same as mine, if they had had to decide this case. I find that the defendant was not indebted in any sum to Wade at the time of the service of the order.

Newton, Calcott & Calcott.

J. Carnegie.

STEPHEN, J.

1884.

November 14.

HERMAN v. JEUCHNER.

An agreement with a prisoner to become bail for him, in consideration of the prisoner depositing with the intended surety the amount of bail, is void, as being against public policy. The prisoner can recover the amount deposited for the security, even before the time, for which the bail is in force, has expired.

THIS was an action to recover a sum of 49*l*. The defence (which his lordship found was proved) was in the following terms :—

“The circumstances under which the defendant received the money were as follows :—In April, 1883, the plaintiff was in prison, and required bail for his good behaviour for two years before he could be released. He desired the defendant to become such bail, but the defendant refused, unless the amount of the penalty under the said bond (50*l*.) was deposited on the terms that it should not be returned during the said period of years, but consented to do so if the said sum was so deposited; and thereupon 49*l*., part of the said sum (being the amount sued for in this action), and being all the plaintiff could deposit with him, was deposited with him on the said terms, and he became such surety, and the plaintiff was released.”

This action was brought long before the expiration of the two years.

Stanley Boulter, for the plaintiff, relied on *Wilson v. Strugnell* (L. R. 7 Q. B. D. 548).

Cock, for the defendant, contended that the transaction

was not one against public policy : and also that in any case the law would not assist the plaintiff to recover back the money in breach of the terms on which it had been deposited, where the defendant had performed his part of the contract as here. He cited *Taylor v. Chester* (L. R. 4 Q. B. 309).

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HERMAN
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STEPHEN, J.—I adhere to what I said in *Wilson v. Strugnell*. If it is thought right in the public interests that a man should only be released from prison on his finding surety for his good behaviour, it is detrimental to public interests that the public should lose the advantage of having such surety ; and this advantage is lost if the surety is not a real surety, but a sham one, as in this case.

Nor do I think the principle of *Taylor v. Chester* applies here. If the plaintiff after his release had misconducted himself, and the defendant had been obliged to pay the money deposited with him, no doubt the plaintiff could not then have recovered the money back. The matter would have been at an end, and the contract would have been performed. But here the matter was not at an end, and the money was still in the hands of the defendant. There must be judgment for the plaintiff.

E. D. Lewis.

Freeman & Winthrop.

GROVE, J.

SQUIRE v. ARNISON.

1884.
November 15.

THIS was an action against the defendant as executor of one Morgan for breach of a warranty on the sale of a public-house by Morgan to the plaintiff, by which Morgan guaranteed the takings to be 470*l.* per month. The plaintiff claimed 2,700*l.*

An executor was sued for damages for a breach of warranty given by his testator on the sale of a business. He denied the alleged non-compliance with the warranty, and also pleaded *plene administravit* prater certain

The defence admitted that the agreement for sale contained the words "takings guaranteed at 470*l.* per month," but denied that the plaintiff purchased on the faith of the

sums. The plaintiff obtained judgment for a sum slightly less than the admitted assets. Held, that the executor was personally liable for the costs, in so far as the testator's estate was insufficient to pay them.

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guarantee, and alleged that the takings were in fact 470*l.* per month, and that the premises were not sold above their value. The defendant also pleaded *plene administravit præter* 188*l.* 19*s.*, and certain bills of exchange, value 120*l.*, 165*l.*, 157*l.* 10*s.*, and 20*l.* respectively, and not then due (except the 20*l.* bill), given by the plaintiff to Morgan in respect of the purchase of this public-house, which made the total amount of assets undistributed in the defendant's hands, including the bills of exchange, 646*l.* 9*s.* He farther pleaded that notice was given, and the assets distributed, under 22 & 23 Vict. s. 35, s. 29. Issue had been joined on this defence. At the trial before Grove, J., in Middlesex, on June 24, 1884, the main question considered was whether or not the takings did amount to 470*l.* per month, and the jury found a verdict for the plaintiff for 575*l.* damages, to be paid out of assets, *quando acciderint*, and also found in answer to a question from the learned judge that the defendant's conduct as executor was reasonable.

The question now argued was whether the defendant was liable, *de bonis propriis* to the plaintiff for costs.

Reid, Q.C. (with him *Herbert Reed*), for the plaintiff, contended that as the defendant had denied the plaintiff's right of action altogether, the plaintiff was forced to come to trial to obtain a judgment, and that if the plaintiff had taken a formal judgment on the plea of *plene administravit præter*, he would not have got the promissory notes, and the judgment would have been unfruitful. The defendant was therefore liable to pay the plaintiff's costs, if the assets in his hands were insufficient, *de bonis propriis*. He cited *Williams on Executors*, 8th edit. vol. ii. p. 1989.

M'Intyre, Q.C., and *Haigh*, for the defendant, contended that the defendant had succeeded on the plea of *plene administravit præter*, which went to the whole cause of action, and upon which the plaintiff had joined issue, and that therefore the defendant was entitled to his costs on that issue, and that the plaintiff was only entitled to his costs out of the estate on the issue on which he had succeeded. The damages claimed were unliquidated, and could not be ascertained; further, the amount claimed was exorbitant. The passage cited from *Williams on Executors* only showed that an executor

should not plead *plene administravit* unless he had good grounds for doing so. There was no distinction between the effect of the pleas *plene administravit* and *plene administravit præter*. Both pleas were a complete shield to the executor. The cases show that where an executor has pleaded *plene administravit*, and the general issue, he is entitled to the general costs of the cause. They cited Williams on Executors, 7th edit. p. 1983; *De Tastet v. Andrade* (1 Chit. Rep. 629, *in notis*); *Igguldon v. Turson* (2 Dowl. 277); *Bollard v. Spencer* (7 Term. Rep. 359).

Reid, Q.C., in reply.—The cases cited only refer to the plea of *plene administravit*. The plea of *plene administravit præter* does not go the whole cause of action. He referred to *Dunn v. Grim*, 2 Wm. Blk.; *Hancock v. Proud*, 1 Saunders' Repts.

GROVE, J.—I have no doubt in this case. The contention that an executor may take issue on a claim generally, and that the opposite party may have no recourse against an executor personally who brings or defends an action, seems to me an incredible proposition. An executor might, under the pretence of protecting the estate, put parties with a just claim to any amount of expense, and contest every proceeding in an action, and shield himself by saying that the estate is alone liable for costs. There is, it seems to me, a broad and obvious distinction between the effect of the two pleas, *plene administravit* and *plene administravit præter*. In the first an executor says, I have administered the whole estate, and there is an end of it. If the opposite party goes on, then he does so at his peril. It is, if true, a full answer to the action. In the second case, the opposite party goes on to get what he can. The cases which have been cited, and the passage from Williams on Executors, a very high authority, show clearly that an executor is personally liable for the costs, failing the estate, in such a case. The only vestige of authority to the contrary is a *dictum* of Lord Kenyon's, in *Bollard v. Spencer*, 7 Term. Repts. 359; and that is a mere *obiter dictum*, in no way necessary for the decision of the case. It is said that executors pleading *plene administravit*, and the general issue, have had the general costs of the cause. That is clearly right and proper if a plaintiff takes issue upon the

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SQUIRE	plaintiff should have prayed judgment for assets, <i>quando</i>
et.	<i>acciderint</i> . The reason is incontrovertible. My judgment
ARNISON.	must be against the defendant for the amount recovered, and
	the general costs of the action, <i>de bonis testatoris et si non de</i>
	<i>bonis propriis</i> . The plaintiff must pay the costs of the issue,
	<i>plene administravit præter</i> .

Layton, Son & Lendon.

Nash & Field.

FIELD, J.

THE GAS LIGHT AND COKE COMPANY v. THE
VESTRY OF ST. MARY ABBOTS, KENSINGTON.

1884.
May 19.

A vestry were empowered by Act of Parliament to vest in themselves highways and to repair such highways. In repairing such highways, they used steam-rollers of great weight, which fractured the mains of a gas company empowered by Act of Parliament to lay their mains under the highways in the district of the vestry. The vestry did not show that it was impossible for them to repair the roads without fracturing the mains. Held, that the gas company were entitled to an injunction to restrain the vestry from using the steam-roller in such a way as to injure their mains,

THIS was an action to restrain the defendants from using any steam or other roller in such a way as to fracture, damage, or injure the mains, pipes, or works of the plaintiffs.

Davey, Q.C., Webster, Q.C., Sterling and Danckwerts, for the plaintiffs.

Sir F. Herschell, S.-G., and *Muir Mackenzie*, for the defendants.

The facts and arguments sufficiently appear from the judgment of the learned judge.

FIELD, J.—This is an action in which the plaintiffs, who are a large commercial company, carrying on business for their own profit, and who have undertaken the duty of supplying gas throughout a very extensive district in the Metropolis, complain of the defendants for an injury to several mains belonging to the plaintiffs. It is admitted by the defendants that the mains are the property of the plaintiffs, subject to certain limitations that I shall afterwards advert to; it is admitted that the mains in question were lawfully in the place in which they were at the time the injury was committed, subject again to certain limitations; and it is admitted unreservedly that they did break the mains by the use of the steam roller. The plaintiffs would make out a *primâ facie*

case by proving that the mains were their property, and that they were lawfully placed where they were laid: but the defendants say, although they did commit the injury in question, that the plaintiffs' property in the mains, and their right to protection from injury thereto, was not absolute, and that this is not like a case of injury to ordinary chattels: that their right to protection against injury is not sound or good as against the defendants, because the defendants say, "We are surveyors of highways, the streets, in which these mains were, are vested in us, and although you have a right to have your mains properly laid in the street, yet you do not acquire thereby a good title to be protected from injury caused to them by us in the exercise of our duty towards the public of keeping those roads in a proper state of repair:" and they allege that the injury was caused by their exercise of those proper powers, and so they say no action will lie against them for the wrong.

Now the plaintiffs' case is stated in the pleadings as resting upon negligence, which means wherever it is used in law (or almost everywhere) the breach by one man of some duty which he owes towards another. There are two modes in which injury may be done. It may be done directly, and intentionally, and then the act gives rise to an action that used to be called an action of trespass. Here it is not suggested that there was any intention on the part of the defendants to break the main, but that it was the indirect consequence of their act; and, therefore, that being so, it would have given rise in the old days to what was called an action "on the case" for negligence,—not negligence in the ordinary sense, that is to say, it is not said that they used the roller improperly as regards the duty they were going to perform, except in one case, to which I will presently advert. But it is said the defendants had a duty to perform, and that they failed in performing that duty, because they injured the plaintiffs' property. There, no doubt, are a great many cases in which one man, or body of men, may injure and affect injuriously the property of another without being liable to an action. There are the very well-known illustrations which are to be found in the case of railways and tramways, and it has been long established, that if the Legislature does authorise, or direct, or order, that a specific thing shall be done in a specific place,

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then, if that thing cannot be done in a reasonable way without inflicting an injury upon somebody else, no right of action is given at all. Generally the Legislature provides a compensation clause in these cases. Of course it is common justice that they should do so, because if it is fit for the public benefit—for the benefit of any portion of the public—that one man should be able to do injury to another, it never could be the intention of a just Legislature to throw that injury on the unoffending party.

Now, what must the plaintiffs make out to entitle them to succeed?

They must first of all show a duty. It is for them to show that the defendants have a duty towards them, and that they have violated that duty, and so caused the injury. *Primâ facie* the plaintiffs would discharge that onus by merely showing that the pipe was their property, that it was in a lawful place, and that injury had been done. But this is not a case in which the plaintiffs occupy the ordinary position of the owner of a chattel, or property. They occupy an exceptional position. These mains were in no way under their immediate control, or in their own land. They are in land which has been formed into a street. Now, that being so, the defendants say, "Your right is not the general right of an individual to be protected against all injury, but it is a subordinate right, that is, it is subject to our right of property in the road which is vested in us, and to our duties and obligations. Therefore, if we have done this injury, we were justified in doing it, because you had no right as against us to the undisturbed uninjured possession of your mains, or at all events, we had a right in the exercise of the powers conferred on us to do the injury of which you complain." Therefore, the first step in order to arrive at a conclusion as to which of the parties is entitled to judgment in this case is to ascertain what are their respective rights and duties, and for that purpose, it is necessary to examine first the plaintiffs' rights and duties, and next the defendants'.

Now, in the present case, it is to be observed that the rights and duties of each of them are defined by statute. The plaintiffs' title is vested in them by certain Acts of Parliament. I will deal with them more in detail later on, but I take it, it may be considered a sound proposition that the

plaintiffs have all the natural rights of an owner of property, unless there is some restriction upon them, unless the statute has limited their right, and has said that they shall possess these mains, subject only to the rights of some one else. This must be clearly established by the statute.

The plaintiffs' title rests principally on the Gas Clauses Act of 1847 (10 Vict. c. 15); the defendants' title rests on the Towns Improvements Clauses Act of 1847 (10 & 11 Vict. c. 34). The former gives the plaintiffs power to lay mains in streets, whether highways or not; the latter gives the defendants power to vest in themselves highways, making them surveyors of highways, and giving them power to repair the highways. The first case to which I will refer as showing the principle on which this matter must be dealt with, is the case of *Jones v. The Festiniog Railway Company* (L. R. 3 Q. B. 733). I take that case first, although there are a great many earlier cases, because it contains a clear enumeration by Mr. Justice Blackburn of the principle to be applied. In that case, the company had an Act of Parliament which enabled them to use the old-fashioned tramway for the carriage of minerals. It was a railway or tramroad for the passage (in the largest possible language) of waggons, engines, and other carriages, for the purpose of conveying minerals, &c. They had power to "construct, make, and do all other matters and things fit or necessary for the making, altering, preserving, improving, completing, and using, the said railway or tramroad, wharves, and other works," necessary thereto. There is a specific proviso that they shall use an engine of the most approved form. At first they did not use any locomotive engine. Then when improvements in locomotive engines took place, they used them, and in so using them set fire to their neighbour's stack. Upon that the question arose whether they were liable or not to make compensation to the plaintiff, and it was held that they were liable. Mr. Justice Blackburn said, that the general rule of the common law was correctly laid down in *Fletcher v. Rylands* (L. R. 3 H. of L. 330). He points out the exception which was created by *The King v. Pease* (4 B. & Ad. 30), and *Vaughan v. The Taff Vale Railway Company* (5 H. & N. 679), which, however, in creating the exception, only affirmed the correct-

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ness of the doctrine laid down in *Fletcher v. Rylands*. He then quotes from the judgment of Cockburn, C. J., in *Vaughan v. The Taff Vale Railway Company*, the following passage, "Although it may be true that if a person keeps an animal of known dangerous propensities, or a dangerous instrument, he will be responsible to those who are thereby injured, independently of any negligence in the mode of dealing with the animal, or using the instrument, yet when the Legislature has sanctioned and authorised the use of a particular thing, and it is used for the purpose for which it was authorised, and every precaution has been observed to prevent injury, the sanction of the Legislature carries with it this consequence, that if the damage result from the use of the thing, independently of negligence, the party using it is not responsible." Then the learned Judge goes on to say—"In order to bring the present defendants within the decision, it is essential to show that their Act authorised the use of locomotive engines; and it is not enough to show that it authorised the making and using of a railway, and that there are no words either prohibiting the use of locomotives or showing that the Legislature meant to prohibit the use." Then he goes through the sections of this Act, and says, "At the most the statute authorises the making of a railway, and the drawing of carriages along it, by some means or other, and does not prohibit the use of locomotive engines for this purpose; but there is nothing to authorise the use, so as to relieve the company from their liability to the consequences at common law of using them." The next case, which is not so important, is the case of *Powell v. Fall* (L. R. 5 Q. B. D. 597), which I need not advert to; but the case of *Geddis v. Proprietors of Bann Reservoir* (L. R. 3 App. Cas. 430), is, I think, very important. The Bann Commissioners were authorised to store the water of the River Bann, and to discharge it at various times through various channels, and amongst others, through the River Muddock. Accordingly they did their duty, and they discharged it, as they were authorised to do, through the channel of the River Muddock. But the channel of the River Muddock was, in its then condition, not in a proper state to receive the water, or to cause it to pass away, the result of which was that the plaintiffs' land became flooded and injured. It was

held that he was entitled to recover, upon the principle that the Legislature, although they had specifically said, 'You may discharge the water of the Bann through the Muddock,' and that therefore, the passage of the water through the Muddock was a thing authorised by the Legislature, yet that it did not intend that that should be done, unless the Muddock was kept in such a condition as to enable the discharge to be effected without injury to an individual. It was pointed out, that the defendants had power to keep and maintain the channel in that condition. Under those circumstances, it was held that the only thing authorised was a discharge of the water at a time when by the exercise of their own powers the defendants could keep the channel free.

Then came the case of *The Metropolitan Asylums District Board v. Hill*, (L. R. 6 App. Cas. 198.) That went even a step further, perhaps, as regards the facts, because there was first of all an enormous public injury to be guarded against. There was a large class of poor unfortunate people to be taken care of; those unhappy people were in a crowded metropolis. It was essential that they should be isolated, that they should be put into some place which should not be too far off, and where they had some chance of recovery without infecting other persons with the disease from which they were suffering; and moreover the Asylums Board were placed under the direction of the Local Government Board who had power to direct where it should be erected. Small-pox is one of the diseases for which they were to provide this asylum, and accordingly the defendants reasonably and properly obtained a piece of land with the consent of the Local Board for the purpose of housing and taking care of their small-pox patients. Under those circumstances it was contended that they were justified in doing that, although they created a nuisance by so doing to the class of property adjoining; but the House of Lords refused to assent to that. I will advert without going through it in detail to the judgment of Lord Watson. He says, "I see no reason to doubt that wherever it can be shown to be matter of plain and necessary implication from the language of a statute that the Legislature did intend to confer the specific powers above referred to, the result in law will be precisely the same as if these powers had been given in express terms. And I am disposed to hold that if the Legislature,

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without specifying either plan or site were to prescribe by statute that a public body shall within certain defined limits provide hospital accommodation for a class or classes of persons labouring under infectious disease, no injunction could issue against the use of a hospital established in pursuance of the Act, provided that it were either apparent or proved to the satisfaction of the Court, that the directions of the Act could not be complied with at all without creating a nuisance. In that case the necessary result of that which they have directed to be done must presumably have been in the view of the Legislature at the time when the Act was passed. On the other hand I do not think that the Legislature can be held to have sanctioned that which is a nuisance at common law, except in the case where it has authorised a certain use of a specific building in a specified position, which cannot be so used without occasioning nuisance, or in the case, where the particular plan or locality not being prescribed, it has imperatively directed that a building shall be provided within a certain area and so used, it being an obvious or established fact that nuisance must be the result. In the latter case the onus of proving that the creation of a nuisance will be the inevitable result of carrying out the directions of the Legislature lies upon the persons seeking to justify the nuisance. Their justification depends upon their making good these two propositions—in the first place that such are the imperative orders of the Legislature; and in the second place, that they cannot possibly obey those orders without infringing private rights."

Now, another case which was referred to was the case of a urinal at the back of Regent Street, *Vernon v. Vestry of St. James'*, (L. R. 16 Ch. D. 449.) Nothing could be more certain than that the position there, was one that would do as little injury as was possible to be done. At the same time, it was a nuisance which was calculated to do injury to the rights of the owners of property abutting on the place where it was situated. Under those circumstances it was held, although the Vestry of St. James's had exercised their discretion in placing the urinal where it was, that an injunction should issue to restrain them from continuing it there, because it interfered with and injured private rights.

Now, therefore, upon these cases, I take it that the prin-

ciple of construction I have to apply to the present case is to see whether the statutes referred to have deprived the plaintiffs of the absolute right which they would have at common law to protection of their property against injury; or to put the same proposition in other words, whether the defendants were authorised by statute to injure that property of the plaintiffs. Now, unless it was expressly said, or that was the necessary intendment of it, I cannot so hold. Further, I must take it as the result of the cases that the mere authority to use the lawful and the best means for doing a thing, unless the specific means are expressed, or it is to be inferred that the thing cannot be done without the use of it, does not defeat the plaintiffs' right to protection, or enlarge the defendants' power to do the injury. It never can be intended that one man is to injure another by authority of parliament, unless you can see clearly that the Legislature has so said, and the act, the doing of which is authorised, cannot be done without inflicting the injury. I must therefore see whether the defendants have established that they have been justified in doing what they have done by the authority of parliament.

Now in the cases complained of, there have been a vast number of injuries, but the particular injuries we have to deal with are stated in the statement of claim, and this is what is alleged: After setting out the title:—"that the various streets are all highways within the parish and are maintained and repaired by the defendants," it is further alleged: "The defendants in repairing the highways within the said parish have for some time past used or caused to be used and still use or cause to be used divers steam and other rollers of very great weight, and in such a manner as in numerous cases to break, bend, or otherwise damage the mains, pipes, and other works of the plaintiffs under the said highways." The particular instances of damage alleged are set out in the 6th paragraph, and it appears that the plaintiffs, or rather the Western Company I think originally, had laid down mains, though at what exact date there is no proof. The plaintiffs took them over at the time of their incorporation. There is no evidence to show that they were either made of improper material, or that they were improperly laid, with the exception that I shall hereafter refer to, which has been pointed out by

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the Solicitor-General as a reason why the injury has been sustained. Therefore it appears that they were good and proper mains, and that they remained in good condition up to the time of fracture. Now at the time the mains were laid all these streets were highways repairable by the public, and they were kept in repair by the means then known of horse rollers or other modes, and it was not until 1872 that any other mode of repairing came into general use. They are in the populous neighbourhood of London, exposed to heavy ordinary traffic, no doubt, as well as occasionally to extraordinary traffic, but up to 1872, though there had been isolated cases of fracture of mains (as to which I think the evidence was that some local cause for them could generally be discovered), yet up to 1872 there had been, if I may say so, no general complaint of fracture of mains or pipes. About the year 1872 or 1873 the defendants acquired a 15-ton steam roller, and later on a 10-ton steam roller and they used them for the purpose of exercising their duties and repairing the roads. But I am quite sure in doing that, they had not the smallest intention of doing injury to anybody, and they honestly believed, and no doubt still honestly believe, that in all that they did, they were using the most economical and best means of performing the duties vested in them.

Now the way in which the rollers are used is important. I think in all the cases that I have to deal with here, they are cases of what is called 'making up' roads; that is, not laying out a new road, but making it up. After the road has been formed a certain time, as we are well aware, from the constant friction upon it, it wears away and it is necessary to make it up again; and we have heard from the witnesses a very clear account of what the operation is when it has to be performed. First of all, the surface metal has been reduced considerably, and therefore the road is picked over crossways by two series of pickings, and then the squares are lifted by two series of inter-sections, so as to make a rough holding surface over the whole of the road. On that, six inches or eight inches, or whatever the quantity of metal may be, is put, and then all the projecting masses of granite, greater or smaller, according to the degree with which they had been broken up in the stone yard; over that the roller is repeatedly drawn until the mass of granite

on the surface is reduced to a level, so that horses, carriages, and ordinary traffic may conveniently pass over it. Formerly horses had to do the work ; the ordinary private traffic had to do a great portion of it, and no doubt anything which would prevent that, if there were any means of doing that, without doing any injury, would be an exceedingly desirable and excellent invention ; but from the time of the introduction of steam rollers, there came fractures. It is in evidence that in Kensington alone, since 1880, there have been thirteen fractures of mains by the steam roller ; and a still greater number of pipes have been broken. A similar experience has spread almost all over the metropolitan area ; that is to say, it is from that time that these fractures first occurred.

Ordinary traffic had not produced this condition of things before ; this succession of fractures in rolling roads was unknown. Several witnesses were called who have investigated the causes of these different fractures, and they have been unable, with small exceptions, to assign any cause for the fracture, except the use of the steam roller.

There are altogether seven cases of injury complained of. There are two as far back as 1879, and, so far as regards any relief or damages in these cases, the defendants having pleaded the Statute of Limitations, there is an end of them. With regard to the others, there are two exceptional cases which I will deal with by and by, known as the New Road Cases, but the cases barred by the Statute of Limitations, namely, those in Eardley Crescent and Lansdowne Road, although they are out of the case for the purpose of recovery, may yet be considered by admission as illustrating the principle of the mode in which the injuries are done. The Portland Road case I purposely except now, because with regard to that road there is a very considerable difference in the depth of the main. In Lansdowne Road the depths of the pipes were 21 and 24 inches. In Eardley Crescent the depth was 20 inches. In the New Road it was 18 inches, and in the Portland Road it was 8 inches.

Now, therefore, that brings me to the consideration of what is the nature of the plaintiff's title. Is it a weak title, or had they the rights of ordinary owners of property ? Now, as I have already said, the Private Act of the plaintiffs' company has incorporated the Gas Works Clauses Act of 1847. I am

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not going in detail through all the sections. I have been carefully through them. I will not examine them in detail, but the result comes out, that the plaintiffs have the power to break up the streets under the superintendence of the authority, where there is an authority, and they are bound to give notice; they can only break them open under the control of the authorities, and they must reinstate them. That was with regard to streets which were under the management of an authority. With regard to other land, if the street has not become dedicated so as to become a highway then they are bound to obtain the consent of the owner. The Metropolis Gas Act (23 & 24 Vict. c. 125), really repeats these powers again in very much the same language. There is one important section, showing a distinct declaration on the part of the Legislature that the powers vested in any local authority should not be prejudiced.* It would have been the same without that. That was a direct expression of the intention of the Legislature that the powers conferred on local authorities were not to be interfered with. There is nothing, therefore, to limit their rights in any shape or way.

Now then what are the defendants' powers and duties?

Originally Kensington was under an Improvement Act. That incorporated the Towns Improvement Act of 1847 by which the management of all streets which should be or become highways were vested in them; by which the commissioners were surveyors of highways, and subject to all the

* *Section 54.* Nothing in this Act contained shall avoid, prejudice, or impair, any of the powers, now exercised by or vested in the Metropolitan Board of Works, or in the Commissioners of Sewers of the city of London and the liberties thereof, or any powers now vested in any local authority within the metropolis, or any powers now exercised or possessed in respect of the manufacture or supply of gas, within the metropolis, by any railway company, or by any other person, or persons, making or supplying gas for his or their own use, and not making,

or supplying gas to the public as a trade or business; provided that if the said local authority shall refuse or delay their consent to any company to lay down mains or pipes in accordance with the provisions of this Act, it shall be lawful for the said Secretary of State under his hand to authorize the same to be laid down without such consent; and after the date of the application by such company to the said Secretary of State for such consent no penalty shall be incurred by any default of such company, so far as it is occasioned by such refusal only.

duties and liabilities of surveyors, and were indictable for misdemeanour if they neglected to repair. Therefore they were under the obligation to keep the streets in repair.

Then came the Metropolis Local Management Act (18 & 19 Vict. c. 120), which transferred to the vestry all those powers, and again repeats very carefully the provisions on which the Solicitor-General relies. Sect. 96 is an exceedingly important section in his view of the case, because that expressly makes them surveyors of highways, vests in them all streets being highways, and pavements, stones, and materials.* It gives them power by sect. 98 to alter the position of pipes in a road. It compels them to give notice of it and makes them do it under proper superintendence. By sects. 114 and 115 it gives power to the vestry, if the company do not perform their duty, to make it good and charge them with the expense. All that is with regard to old roads. But the Solicitor-General admitted that with regard to old roads there would be a certain amount of hardship upon the plaintiffs if the defendants' construction was right. But with regard, he said, to roads in which there were mains, and which mains had been laid at the time they were private property, and with the consent of the owner, the management of which was afterwards undertaken by the defendants, he

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* Section 96. Every vestry and district board, shall, within their parish or district (exclusively of any other person whatsoever), execute the office of and be surveyor of highways and have all such powers, authorities and duties and be subject to all such liabilities as any surveyor of highways in England is now or may hereafter be invested with or liable to by virtue of his office, under the laws for the time being in force, so far as such powers, authorities, duties, liabilities, are not inconsistent with this Act; but all expenses which under any such law ought to be defrayed by highway rates shall be defrayed by means of the rates to be raised under this Act, and all moneys which would be applicable in aid of such highway

rates shall be applied in aid of the said rates to be raised under this Act, and no such vestry or board shall be subject to any provisions concerning the accounts of surveyors of highways, or requiring any returns to be made to any special sessions; and all streets being highways, and the pavements, stones, and other materials thereof, and all other things provided for the purpose thereof by any surveyor of highways, or by any person serving the office of surveyor of highways, or by any vestry, or district board under this Act, shall vest in and be under the management and control of the vestry or district board of the parish or district in which such highways are situate.

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contended that the position of the defendants was unassailable. With regard to those roads, very full powers are given by sects. 51 and 54 of the Improvements Act, and the Metropolis Local Management Act of 1862, and by Michael Angelo Taylor's Act also, to raise or lower levels; and they may declare any street a highway and have it paved, repaired, and flagged. Now again there is nothing there expressly in any way diminishing or deducting from the title of the plaintiffs as the ordinary owners of a chattel, but there are provisions which show that their right is absolute, at all events as against the defendants in one event; because the defendants, as surveyors of highways, representing the public, might in their discretion think it desirable to alter the level of the roads, to reduce a hill here and fill up a valley there, and there is an express power given to the defendants so to do, but coupled for that purpose with this, that they may alter the levels of mains, but then they must do that at their own expense. The Solicitor-General admitted that the plaintiffs' title was an absolute one as against them as regards that, and, therefore, so far as that was concerned the plaintiffs' rights were not subordinate to those of the defendants. The defendants' rights might have been under those circumstances to say:—"Take away your pipe—it interferes with my road—my road is vested in me. I cannot have the public going up and down this hill perpetually. Take away your pipes and move them, or put them at the proper level. I do not care a bit about you." That would have been one mode in which they might have been treated, but the Legislature has not treated them in that way because it has said, "you may do it, but you must do it at your own expense." It seems to me, looking fairly at it, that that threw on the Solicitor-General the necessity of limiting the right, and he said he must put it, and he did put it in this way, "You have no right as against the public benefit and advantage; we are the surveyors of highways; we are an unpaid body, trustees of public rights of great importance in this crowded metropolis; you are a company carrying on business like every other speculator with your capital invested, making large dividends, and using your powers for that purpose. It cannot be supposed that it ever could be the intention of the Legislature that a private trading company like this or like a

water company should actually have the right to make large dividends out of the public inconvenience. It must be the intention of the Legislature that their rights should be subordinate to the rights of the defendants, and when I say the defendants I mean the public whom they represent." "Therefore," he says, "You must take all your pipes subject to that, and if in the case of doing our duty to our constituents we find it necessary to injure a main, you must take the consequences of it." Now one way in which he pointed out that they were limited is this. He said, "You must take care when you lay your mains, that you lay them at such a depth that they shall not be broken. You therefore must take that risk. Moreover you must lay them in such a way that they shall not be broken, and you must put concrete under them, if they are broken without concrete. Moreover you must use such a material as shall not be broken; and, inasmuch as wrought-iron service pipes stand while cast-iron mains break, you must make all your mains of wrought iron. All this must, in point of fact, be subservient and subordinate to our rights."

Now, though not in those particulars, yet that, to a certain extent, the defendants have the primary right, if I may use that word, I agree; not that there is any express language in the Act which says it, but the very use of the Act and the nature of the defendants' situation show it. First of all, I do not see any reasons to suppose that the Legislature looks upon gas companies or water companies, at present at all events, with any disfavour. I cannot conceive that the Legislature intends persons to go and apply their capital to disadvantage, and to tell them that the money their company has invested in mains is to be subordinate and subject to the right of anybody to break them. I repeat what I said during the argument that these various bodies have correlative rights and duties; that the thing is to be laid in the street clearly satisfies me that the street is to be maintained as a street, and therefore the company are clearly prevented from doing anything which shall interfere with the use of it as a street. If they were to place their pipes on the surface of the road I would enjoin them in a moment from doing it, because it would be interfering with the use of the street. Therefore I think it is perfectly clear that the primary object of a street

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must be maintained, and consequently that a street must be repaired, but to what degree of repair I will deal with by-and-bye.

Now let us consider the main reason why the Solicitor-General says these particular mains were not entitled to the protection of the law or the rights of property. He says they were laid at an improper depth. Not because they were put at a depth which was not usual before, but because they were put at a depth which rendered them liable to be crushed by the roller, although there was no prior injury or subsidence proved. Now the statute contains no limitation with regard to the depth at which they are to be laid. But I take it, the nature of the subject and the places where things are to be done, and the nature of the joint use of the road, point out what the depth is to be.

There is no express limitation, but first of all does not the nature of the subject show the depth? Certainly. What do the undertakers undertake to do, and what is the consideration which they give to the Legislature for the purpose of incorporating them and allowing them to have those dividends? What has the gas company to do? They have to cause their gas to rise from the lowest level from their gas supply, wherever it is, to every gas lamp and house up to the surface. Therefore, irrespective of anybody else making use of the road, they must of necessity look at the hills and levels of the country where they have to go. They must find out where people have thought of building houses, and must lay their mains and levels so that they should be met with. But that is not all. They are joint tenants, if I may use the words, of the under surface of the road with two other very serious and uncomfortable companions. They have first of all got the vestry themselves who have got the surface of the road for the purpose of repairing it, and who have got under the road for the purpose of laying down their sewers and house drains. So again their levels are indicated by the nature of the thing, because the drains must be in such a position as to receive the drainage from the houses, and, at its outfall, to get rid of that drainage. Therefore all those levels have to be considered as far as this is concerned.

Then come the water mains. That must follow the sewer, and that cannot go below the sewer. Then comes the gas

main on the top of all, and that again has to wind its way in and out, or slightly up and down, according as the nature of the soil may be, as the ground may be occupied by the sewers or by water mains. Therefore it seems to me that the Legislature very wisely omitted to prescribe any particular depth. They said the nature of the thing will show where it is to be as far as regards that. Then the nature of the street again shows that it must be put at a certain distance from the surface. Again the very necessity of guarding against temperature shows that the mains must be at a certain depth, otherwise the gas will cease to be delivered at all, and the water will be frozen. All that shows there is a duty on the part of the plaintiff company (and if they commit a breach of their duty, it would disable them from recovering damages for any consequences arising from it) to lay their mains with a due regard, first of all to the surface which has to be maintained as a street; secondly, with regard to the pipes of other people; and lastly, with regard to their own necessity of obtaining a level which is recognised distinctly in one of the sections of the Act, which says when they give the defendants power to alter the levels, it is "so that the free and uninterrupted current of gas and water shall not be thereby diminished."

Under these circumstances what is the question here? What depth had they been laid? They have been laid at depths, as I have said before, of 18 to 23 inches.

Now comes the important question on which I think a great portion of the Solicitor-General's argument depends, that is, what is the relation of the plaintiffs to the traffic which is to go over the road? The Solicitor-General says that that traffic has to be maintained, and I agree with him. And he says that the defendants have to repair the street. Again I agree with him; but to what degree they have to repair it becomes the question; because I agree that the plaintiffs' right is subordinate to a right to repair. What then is the right to repair, or rather what is the measure of the duty of the defendants to repair. I have held for a long time on many occasions that the duties of surveyors of highways to repair shifts with the use the public require of the road. They are bound to repair up to the standard, and not beyond the standard, of ordinary traffic. They are not bound to repair against

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extraordinary accidents or extraordinary traffic. I take it that if Mr. Dixon or the Metropolitan Board of Works were to think it desirable to-morrow to remove the Obelisk, or if the statue of the great Duke were taken from Hyde Park Corner and moved across some macadamised road, and the weight were so uneven or so unequally distributed as to break down the road, the surveyors of highways would not be liable for anything of that kind; they could not be indicted; they would not be guilty of a misdemeanour, because they are not bound to repair the road up to that point. Supposing they were to send to the surveyors of highways, and say, "We are going to take the Obelisk over your road, and we require you to repair it," they would say, "No, we shall not do anything of the kind. It is only the ordinary traffic that we are bound to repair against;" but if in such a case any injury were done, then the person who committed the injury by reason of that extraordinary traffic would be liable to the person to whom he committed the injury. It therefore seems to me that the true view is this, that the duty of the plaintiffs with regard to the depth and the mode of laying their pipes is that they are bound to lay them at such depths and in such manner as will guard against injury by the ordinary traffic of the roads; but they are not bound to lay them so as to provide for an exceptional case like that which I have supposed. Now, is there any difference here with regard to the duties of the surveyors? If to-morrow or in the course of the next two or three years steam locomotives became the ordinary mode of travelling over the metropolis, or in any particular parish, the duty of the surveyor would be to repair up to that standard, because as soon as an altered state of things comes into existence his duty enlarges. That question received a great deal of illustration in a case before Lord Coleridge and myself under the Locomotive Acts. The district of Box and Corsham, in Wiltshire, has of late years become an enormously large stone producing district, and the result is that a particular road between the quarry and the railway station was so worn out by the perpetual passage of carts with stone that the surveyors claimed of the stone people to receive the money for the repair of the road, which they said was caused by this extraordinary traffic. Lord Aveland's case was an illustration the other way. (*Lord Aveland v.*

Lucas, L. R. 5 C. P. D. 211, C. A. 351.) There the surveyors did receive and were entitled to receive from Lord Aveland compensation for the use of a locomotive because that was extraordinary, inasmuch as it caused greater weight on the particular spot, but in the Wiltshire case we held without doubt (and there was no appeal) that the traffic there, although it was very extensive and very frequent and perpetual and constant, was ordinary traffic. It was not so fifty years ago. Fifty years ago the surveyors might have repaired it enough for a farmer to get his horse and cart over when he was carrying manure, but it has become since then the ordinary traffic of the district, like if you carry coals in a coal country or stone in a stone country, and the duty of the surveyor was to repair up to that standard. They would be indictable if they did not do it. If their roads got out of repair by reason of these stone carts the inhabitants of the parish at large would be indictable, because that was their duty under those circumstances. I cannot help thinking, therefore, that that discloses the limit which may form a guide as to what the duty of the plaintiffs here is. I say their duty is to take care that they do not interfere with the ordinary traffic, and that the measure of the duty of the surveyors is the ordinary traffic for which they have to provide.

Now, in the present case the defendants' user is not a user in the ordinary traffic. As regards the Parish of St. James's, or any of the parishes about here, they hire their engines from Mr. Mowlem, and when he sends out that engine he is using extraordinary traffic, but still it is traffic. But this is not traffic here. The defendants are using an instrument for the purpose of beating down the road—not of passing over the road. They do of course pass up and down the road, but that is not the ordinary use of the road. The duty with regard to the use of the public is for the public to pass over it, but that is not what the defendants are doing here. It seems to me it cannot be that because they are surveyors of highways they have any justification more than anybody else for bringing upon the particular spot a mass of extraordinary weight, passing and repassing over and over again over the same spot, for the purpose of repairing, and so creating the injury and mischief which is complained of. Therefore it

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seems to me that, looking to the evidence on this point, I must find that the evidence is almost on both sides pretty much the same—that is, that eighteen inches to twenty, twenty inches to two feet, is proved by all the plaintiffs' witnesses to be the ordinary average depth, one or two of the defendants' witnesses actually saying they preferred twenty-four inches, but the mains have been laid at this depth of eighteen to twenty inches, and in one case of twenty-four inches, for a series of years. The defendants who since they have had the roads have never made the smallest complaints of them, who have had power if they chose to alter the level, have taken over the roads with them at that depth without making any objection at all, coupled with this fact, that until the introduction of the steam roller an accident from ordinary traffic never has occurred. It seems to me therefore, that being the state of things, the fact that they have laid these pipes in the position they are in, does not affect the plaintiffs' right and title to recover for the damage. With regard to the Portland Road, that is the exceptional case. It is eight inches. If it had been shown that those eight inches had made a difference there, it would have been perhaps worth while to consider the question; but I do not think it bears on the general question that I am going to decide, and it will be as well perhaps to leave it out on account of the different depth, and to treat it as an exceptional case, just as the New Road case may be treated.

The great object of the parties is not to get a victory or avoid suffering a defeat on any particular case. The object of both sides is to have a principle laid down which will govern them in the future with regard to their practice as to high-ways.

Now the next point I think will be as to whether or not, not having laid their mains in concrete is to deprive them of their right to bring an action. With regard to that, I think the same observations apply. Mr. Weaver, one of the defendants' witnesses, who gave his evidence very fairly, says I have never dreamed of asking them to lay all their continuous mains in concrete. I never dreamed of anything of that sort. I never thought that Eardley Crescent ought to be laid in concrete or under concrete, or Portland Road, or any of them. He says, my view of it is this (and it seems to me a very

sensible view), if there is a soft place where you cannot prudently lay a main because of the yielding character of the soil there, I think concrete ought to be used, or if you are crossing an obstacle, it may be as well to use concrete. In these cases there are, no doubt, very considerable difficulties in the way of doing that, and as to the depth to which you would have to go. But I thoroughly understand Mr. Weaver has never contended, and does not contend now, that the continuous mains throughout the district ought to be laid in concrete.

There is a good deal of contest on the evidence whether it is the best or not. If it were necessary I should have to decide that question one way or the other, but I do not think it is at all necessary, because I rely on what is called the logic of facts, and that is that nobody has ever dreamt of laying gas mains in concrete. Therefore I think the universal experience of the world is against the defendants' contention in that respect.

Now another great issue arose (and a very important one it was) with regard to the use of the steam roller, because the Solicitor-General, I think, goes almost the length of saying, that in the present state of knowledge this is by far the best mode of making and repairing roads, I do not think he says the only mode, but he certainly says it is by far the best mode of making and repairing roads. It is powerful and rapid in its action, it interferes as little as possible with the convenience of the people who have to go over the road, which, in my opinion, is the greatest interest which has to be protected, and it is more economical. But then he is met with a vast quantity of evidence to the contrary. The witnesses on both sides are, as far as I can make out, of equal eminence and equal respectability. On the one hand you have Mr. Burt who thinks it neither economical nor useful, although he uses rollers. You have a witness from Blackburn, who says he has given up the use of rollers, and does not think them so good, although he over and over again said what charming things they were, and that they saved the ratepayers 500*l.* a year, I think, or the cost of their engine in a very short time. First of all it is clearly not necessary because it is quite certain that the road would become as good without rolling as before, although the steam roller is more

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1884. convenient. Supposing I were to put the balance of testimony
 THE GAS LIGHT in favour of the Solicitor-General's view, as in one respect I
 AND COKE do, because I am satisfied it is more expeditious, yet on the
 COMPANY whole I cannot infer from that, that it was the intention of
 v. the Legislature or the necessary intendment from the Legis-
 THE VESTRY OF the use of it should be injurious to private pro-
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 ABBOTS, KEN- length of time during which a five-ton or a ten-ton roller is
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 dangerous consequence of implying a permission to injure
 another without express words to that effect. The question
 of economy is entirely doubtful. I cannot say one way or the
 other how that may be. Therefore in these circumstances I
 have gone very carefully through the evidence. I have com-
 pared one side with the other, and assuming it to be more
 economical, assuming it to be more expeditious though not
 better, for older men than Telford made better roads than have
 ever been made since, I cannot carry it so high as that, and I
 am unable, therefore, to bring it within the proposition of Lord
 Watson in the House of Lords, that the use of a steam roller
 is so absolutely necessary and desirable as that I can find any
 Legislative authority to injure another through its use.

There was a very able argument by the Solicitor-General
 which impressed me a good deal, and that was this:—It was
 based upon the principle that if the main is laid upon a level
 bed the steam roller could not be taken to crush it, and that
 therefore in every case where the crushing has taken place it
 must have been due to some prior subsidence or some local
 or temporary cause. Probably Mr. Webster's criticism upon
 the crushing power was well founded. Many things will
 break which do not crush. But then, we have this difficulty
 in the way of yielding to that, and that is experience. The
 pipes are clean cut in one place and they are drawn in another,
 and that has been done actually by the steam roller. If we
 may take the illustration, which is most convenient in that
 respect, of the New Road, I think we can see how that may
 happen. What had happened in the New Road was this :
 The water company had laid a new main the whole length of
 the road from their Reservoir to the Uxbridge Road. They
 had employed very skilful and honest contractors to do it, and
 the evidence before me was that the work had been properly

done, and that the filling in had taken place, that it was properly punned and properly rammed, but of course a thing of that kind cannot be made as solid as the virgin earth was. No skill will do that. Therefore you must take it that when the Legislature authorises a company to interfere with the virgin earth they direct them and compel them to do the best they can in the way of skill to restore it, but the earth underneath and laid on the top of the main must have been more yielding than the virgin earth in its nature would have been. Well, after that had been done, and after that had been filled in, the defendants found the road was in an improper condition, and that it required to be restored. Accordingly they did this. They took out a certain quantity, it is in dispute how much. It is in dispute to what depth they went, but they certainly did take out and dig out a trench of at least twelve inches (the plaintiffs say eighteen inches), and filled it in with what is called hard core. Hard core is a very proper material for making roads. In this instance it is said to have been in too large a condition, and as to that I will not say anything one way or the other, as it is not necessary to decide it. Then upon that they put the metal, and upon that they put the roller. Now we have the pipe before us, and we can see what the action of the roller was. It is quite clear upon the evidence that everything had been properly restored by the Water Company. There had been no house drain put in; there had been no leak in the water main; there had been nothing to cause any subsidence before the impact of the roller, but the impact of the roller did cause a subsidence in one case because it would press upon the hard core which would not yield. The hard core would press either upon the pipe if it was in contact with the pipe as the plaintiffs said, or upon the thin six inches or four inches of material underneath as the defendants say, and the pipe then would press first of all on the underlying clay which is a yielding substance, and I can quite conceive how the impact of the roller going backwards and forwards over that would produce a yielding of the material under the main and cause the drawing of the main and the fracture we have seen. Therefore if that be so I cannot conceive the Legislature would say if there is a tendency to subsidence the plaintiffs are bound to guard against it, or that they take their right subject to that injury.

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With regard to the wrought iron pipes, I say the same as I do with regard to the concrete, they never have been used, they have never been laid, and I cannot see sufficient in that matter to make it of more importance than the other.

Therefore, the result is that with the exception of the New Road and the Portland Road, which may be exceptional, I come to the conclusion that the injury which the defendants have admittedly committed to the plaintiffs' property is one in respect of which the plaintiffs are entitled to maintain an action.

With regard to the New Road, there is a great conflict of evidence as to the circumstances under which that was done. I do not think any of the gentlemen who gave evidence intended to state what was false; but they differ in some very important particulars. On the whole I come to the conclusion it was an imprudent thing, to the knowledge of the defendants, to roll the trench after whatever was done had been done. Therefore in that particular case I think there was evidence of negligence upon which I am bound to act. The result therefore is that I give judgment for the plaintiffs for damages, which will easily be agreed in respect to everything. I omit the Portland Road case, because the depth there might not be sufficient. It is hardly worth while to give a judgment on that. How that depth came there does not appear. It seems the road gave way after the pipe was laid, but there is no evidence whatever of that. Therefore all I can say is, that the pipe there being laid at a depth of eight inches only, and no one saying eight inches is a proper depth, I will not take that into account in giving judgment for the plaintiffs. The important question is, what injunction are the plaintiffs entitled to, because no doubt this action has not been brought for the purpose of recovering damages, but for the injunction. I think I am bound to give them an injunction because the evil has been continuous. It has been very frequent. It is calculated not only to cause the plaintiffs expense, but also to cause injury to life and injury to other people's property. [I think therefore the use of the fifteen-ton steam roller must be restrained. I do not propose to measure the fifteen tons, but I merely take that as being the one that has done the mischief here, and whether ten tons, or six tons, or five tons, will do the injury must be for the defendants

themselves to consider : also whether they can use the fifteen-ton roller on great roads like Notting Hill Road, or places where the crust is thicker must be for themselves to determine. It seems to me I must grant an injunction in the terms prayed, and that is, "to restrain the defendants the Vestry, their servants, agents and workmen from using or causing to be used any steam or other roller in such a way as to fracture, damage, or injure the mains, pipes, or works of the plaintiffs." Of course, if the injury does not arise from the steam roller, but if it arises because the plaintiffs themselves have been guilty of any want of care in laying any particular pipe, or have been guilty of anything else which deprives them of their right, the injunction will not be acted upon. With regard to that I have considered the question, and I think I cannot put the injunction in better or shorter language than that which is comprised in the prayer.

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WILLS, J., and a C. J.

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1884.
November. 7.

THIS was an action for breach of covenant to keep drains in good repair.

By an agreement dated the 22nd day of August, 1882, the plaintiff agreed to take and the defendant agreed to let a house and premises for the term of three years at a rent of 100*l*. The defendant, the receiver appointed in an administration action, entered into the following among other covenants :—

"The receiver hereby agrees on or before the 22nd day of September, 1882, to expend the sum of 50*l*. in the execution of such repairs and works as shall be necessary. And it is hereby agreed that the tenant shall not require the receiver to do any further repairs during the tenancy hereby created, except repairs to the roof, main walls, main timbers, drains,

A lease contained a covenant by the landlord to keep (*inter alia*) the drains and sewers in good tenantable repair. Held, that this did not extend to the rectification of a structural defect in the drains, but was confined to keeping the drains as they existed in a condition of good tenantable repair.

Where a tenant is in possession of premises, the

drains of which the landlord has covenanted to keep in repair, notice by the tenant to the landlord of the defects complained of is essential before there can be a breach of his covenant by the landlord.

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and sewers, which are to be kept in good tenantable repair and condition by the receiver during the tenancy."

There was also a covenant by the plaintiff that she would allow "the receiver and the agents, surveyors, workmen, and others employed or appointed by him to enter any part of the premises hereby demised to do any act which may be necessary in order to comply with the terms of the lease under which the executors hold."

On the 18th June, 1883, a violent eruption of sewage occurred, and the basement of the house was flooded. The plaintiff, after taking such steps as were immediately necessary, sent for a sanitary engineer and ordered him to put the place in proper repair, which was done. On the 22nd September following, the plaintiff wrote a letter to defendant saying that she had been put to great expense about her sanitary arrangements, and asked if she should send the bill for the work which had been rendered necessary. This was the first communication the defendant received with reference to the matter.

L. Coward for the plaintiff.

McLeod Fullarton for the defendant.

The following questions were left to the jury:—

1. Did the plaintiff know the drains were in a bad condition prior to June 18, 1883.
2. Had the plaintiff the means of knowing that the drains were in a bad condition prior to June 18, 1883.
3. Did the defendant know the drains were in a bad condition prior to June 18, 1883.
4. Had the defendant the means of knowing that the drains were in a bad state prior to June 18, 1883.

To the first three questions the jury answered "No;" to the fourth question "Yes."

November 10.

WILLS, J.—In this case the plaintiff sues the defendant for breach of an agreement to keep in good tenantable repair and condition the drains of her house. The substantial defect complained of is not a want of repair. It is not shown that there is a brick out of place, or a pipe broken, or a piece of mortar gone. The only defect of this kind alleged here is

in the lead soil pipe, which is no part of the drain. The cause of mischief was a structural defect. The drain in question consisted of two parts, one a brick barrel-drain 9 inches in diameter, the other and lower portion, a pipe drain, 6 inches in diameter, fitted into the barrel-drain, so as to leave a rim $1\frac{1}{2}$ inch in width all round the pipe, where it issued from the barrel-drain against which grease and sewage matter lodged until the whole became choked and full.

The drains as thus faultily constructed were not useless. They did in fact work as drains, and carry the sewage matter to the cesspool for 18 months—and probably for a very much longer period—but they were particularly liable under such circumstances to silt up in the course of time.

I am of opinion that the agreement does not extend to the rectification of a structural defect, but is confined to keeping the drains as they existed in a condition of good tenantable repair. In one sense the drains were not in a good condition, for they were on a bad plan, but I think it impossible to read the whole of the clause without seeing that its provisions were intended to apply to repairs and to repairs only, and were not intended to impose the obligation to make alterations, however desirable, in system or plan.

This view makes it unnecessary to decide the question whether if these structural defects were within the contract, notice would be necessary before there can be a breach. But even in that view I am of opinion that the case of *Makin v. Wilkinson* (L. R. 6 Ex. 25), applies. That case arose upon demurrer, the sole ground of defence, which was held good, being that the plaintiff, the lessee, had given no notice to the defendant, the lessor, of the want of repair complained of. It was consistent with this allegation that the lessor might have had the means of knowledge. It is true that in the judgments stress is laid upon the assumed fact that the lessor *could not* have known the defects, but Channell, B., appears to have considered it possible that the lessor might by means other than notice from the lessee have acquired a knowledge that repairs were needed, and, notwithstanding that possibility, gave judgment in his favour. *Makin v. Wilkinson* has been followed in two cases. In one of them, *London & South Western Railway v. F'lower* (L. R. 1 C. P. D. 77), the reason of the decision is said to be that where there is know-

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ledge in the one party and not in the other notice is necessary (p. 85); but in the other, *Manchester Bonded Warehouse v. Carr* (5 C. P. D. 507), no knowledge of defects was shown or suggested on the part of the tenant, and yet upon the simple ground that the lessor had had no notice judgment was given for him. It is true that it was not suggested that the lessor had had the means of knowledge, so that the exact state of things established here by the finding of the jury did not exist; but the Court can hardly have considered that the *ratio decidendi* of the case of *Makin v. Wilkinson* was knowledge on the part of the lessee and none on the part of the lessor, or it would not have been held that the case then under consideration was governed by *Makin v. Wilkinson*. In such a state of the authorities it is better to treat that case—unless and until it be overruled or modified—as an express authority for what was actually decided by it, viz., that in the case of a covenant by the landlord to repair in words hardly distinguishable from those in the present case, notice by the tenant of the defects complained of is essential before there can be a breach of the covenant; a proposition which is fatal to the right of the plaintiff to recover in the present action.

The rule appears to me convenient and reasonable. By casting the initiative on the tenant it leaves to him the power of having the landlord's repairs executed at times and under circumstances convenient to himself, and secures him from the inconvenience of having the landlord insisting upon performing his covenants under circumstances and at times inconvenient to him. By securing notice to the landlord it gives him the control which he ought to have over the extent and mode of repair, and protects him from exorbitant claims which but for notice he would have no means of checking. I fail to see any hardship upon the tenant in such a rule. I have been much pressed here by the necessity for instant action, but it is clear that in this instance there would have been no difficulty whatever in sending a telegram to the defendant and giving him the choice of intervening. If in a case of instant necessity like the present the landlord did not act very promptly, the tenant would then be justified in treating the covenant as broken, and doing the repairs for himself, but it seems in the highest degree unreasonable that the tenant should be able to do such repairs extending over three weeks

without any notice at all to the landlord, and then hold him liable whatever might have been spent upon the work.

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Judgment for defendant with costs.

Ex rel. R. B. Acland.

F. C. Greenfield.

Jackson and Wright.

DENMAN, J.

BISSELL *v.* FOX BROS.

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October 30.

THIS was an action against bankers for damages for the conversion of certain cheques or for their proceeds.

Jelf, Q.C., and Whitehead, for the plaintiff.

Charles, Q.C., and F. O. Crump, for the defendants.

The facts, arguments, and authorities cited all appear in the judgment of the learned judge.

November 18. DENMAN, J.—The plaintiff was a manufacturer and wholesale dealer in goods, carrying on business at Wolverhampton under the name of “J. G. Bissell & Co.”

The defendants were bankers at Taunton. The action

dorsed his employer's name per pro. on all the cheques, and paid them into his own account at his bankers, who immediately placed the amounts to the credit of his account as cash. They crossed both the three cheques crossed generally, and three of the uncrossed cheques to other bankers, who obtained payment of the amounts for them from the banks upon whom they were drawn. The seventh, an uncrossed one, was drawn upon themselves, and they placed the amount of this at once to the credit of the traveller. The bankers were told by the traveller who his employers were, but they never made any enquiries as to his authority to endorse cheques on behalf of his employers. The traveller having drawn out the amounts absconded, and never accounted to his employers for the amounts. Held, as to all the cheques, that the bankers were liable to the employers for the amounts thereof, and were not entitled to the protection of section 82 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), because their conduct had not been without negligence.

Held also, as to the three cheques on other banks, originally uncrossed, that the bankers did not bring themselves within the protection of section 82 by themselves crossing the cheques.

Held also, as to the seventh cheque drawn upon themselves, that the bankers had not paid the cheque, so as to be protected by section 60 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61).

Seemle. Section 82 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), does not protect a banker becoming himself the indorsee of cheques endorsed by his customer, the banker having notice of the fact that the customer was only an agent, and abstaining from enquiry as to his authority to endorse his employer's name.

A commercial traveller received seven cheques, three crossed generally, and four uncrossed, drawn in favour of his employer by customers. These it was his duty to forward to his employer, and he had no authority to endorse his employer's name thereon, or pay them into his own account. The traveller en-

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November 18.

was brought for damages for the conversion of certain cheques or for their proceeds. The defence was that the defendants were justified in what they had done, and exempted from liability by the 82nd section of the Bankers Act, 1882 (45 & 46 Vict. c. 61). The facts were as follows:—By a written agreement in 1879 one Shakeshaft agreed to become traveller for the plaintiff. He was to receive certain stipulated commissions upon all goods sold, and all *cheques*, cash, and bills were to be remitted to the plaintiff at the end of each week, and none to be retained without the consent of the plaintiff.

The course of business for some years was for Shakeshaft to remit all sums received in cash directly, by postal or post office orders to the plaintiff, and to send him all bills and cheques by post; but in June, 1883, Shakeshaft opened an account of his own with the defendants' bank at Taunton as their customer, and from that time he paid the sums received as *cash* from customers of the plaintiffs into his own account, and drew several cheques for such sums in favour of the plaintiffs, to an amount on the whole of more than 300*l.*, between June and October, when he absconded. The plaintiff never gave him any authority to pay any bills or cheques into his own or any other bank, nor was he aware that he had done so until Shakeshaft had absconded. The first cheque drawn by Shakeshaft on account of moneys which had been received by him in cash for the plaintiff and placed to his credit in his account with the defendants, was one on the 29th June, 1883, for 41*l.* 9*s.* 10*d.*; the next was one for 44*l.* 18*s.*, on the 13th July. The first of the cheques for the amount of which the plaintiff sought to be reimbursed in the present action was dated 12th July, 1883, and credited to Shakeshaft by the defendants on the 14th.

As regards all the cheques in dispute they were, as soon as received by the defendants, placed to the credit of Shakeshaft immediately. They were all of them cheques payable to "J. G. Bissell & Co. or order," and they were all indorsed in his own hand "*per pro.* J. G. Bissell & Co.—H. Shakeshaft." Six of them were drawn on other bankers: one on the defendants themselves. Of the six three were crossed generally "& Co." between transverse lines, when paid into the defendants' bank (the amount of these altogether was 39*l.* 5*s.*); three were brought uncrossed (the amount of these altogether was

31l. 1s. 6d.). That drawn on the defendants themselves was for 34l. 15s., and was also uncrossed.

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As regards the six drawn upon other bankers both the crossed and the uncrossed were, before they were forwarded to the bankers on whom they were respectively drawn, stamped across the face with the printed words "To Barclay, Bevan & Co. from Fox Brothers & Co., Taunton."

The defendants received through Barclay, Bevan & Co. the money for those six cheques from the respective banks on which they were drawn. The manager of the defendants' bank was called. He said that when the defendant opened an account in June, 1883, he told him (the witness) that he was commercial traveller to J. G. Bissell & Co., of Wolverhampton; that he wished to open an ordinary cash banking account; that he should pay in ordinary credits and transmit them to his firm in Wolverhampton; that he was to keep a minimum credit balance of 50l.; that the cheques in question were taken as cash and immediately placed to his credit in his account as cash; that the object of placing the printed direction to Barclay, Bevan & Co. on the cheques was to prevent any one else from getting payment except Barclay, Bevan & Co. for the defendants; that Shakeshaft was unknown to the witness before, but was introduced by the cashier, who had known his family. The witness, in cross-examination, said, "I knew that a commercial traveller sometimes receives cheques and sometimes cash for his employers. I did not trouble my head about the balance between the cheques received from him and the cheques drawn by him. Some one at the bank would receive them and treat them as cash without referring to me. I was at the bank when those cheques came in; I soon knew they were *per pro* indorsements. It did not occur to me it would be right to enquire as to his authority. I would not now accept a commercial traveller's indorsement *per pro*. of such cheques. I took the risk of Shakeshaft being a dishonest person. The cheque drawn upon us was treated as cash like all the others."

Upon these facts it was contended for the defendants that the case fell within sect. 82 of the Bankers Act, 1882. That section is as follows:—"Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the

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customer has no title or a defective title thereto, the bank shall not incur any liability to the true owner of the cheques by reason only of having received such payment."

The plaintiff's counsel contended that the section was wholly inapplicable on three grounds. (1) That payment of these cheques was not received by the defendant *for a customer*; (2) that there was negligence in crediting these cheques, indorsed *per pro.* as they were to Shakeshaft; and (3) as regards four of the cheques, that they were neither specially nor generally crossed at the time at which they were cashed or treated as cash by the defendants, and, therefore, not within the description of the cheques contemplated by sect. 82.

Long before the Act of 1882 it was decided in *Stagg v. Elliott* (12 C. B. N. S. 373), and has always since been considered to be clear law, that an acceptance or indorsement of a bill *per pro.* is notice to whoever takes the bill that the acceptor or indorser has but a limited authority, and that the holder cannot maintain an action against the party who would otherwise be liable if there has in fact been an excess of the authority. That case was decided in 1862, and is recognised in the text-books as the leading authority ever since. (See Byles on Bills, 13 ed. p. 94.) The Act upon which the defendants rely is an Act passed for the purpose of codifying the law relating to bills of exchange, *cheques*, and promissory notes. By sect. 25 it adopts and stereotypes the law laid down in *Stagg v. Elliott* as follows:—"A signature by procuration operates as a notice that the agent has but a limited authority to sign, and the principal is only bound by such signature if the agent so signing was acting within the limits of his actual authority." By the words "a signature" in this section it is clear that an indorsement is included, for the preceding section (24) speaks of "a signature on a bill." That section is as follows:—"Subject to the provisions of this Act, where a signature on a bill is forged or placed thereon without the authority of the person whose signature it purports to be, the forged or unauthorized signature is *wholly inoperative*, and no right to retain the bill or to give a discharge thereof, or to enforce payment thereof against any party thereto, can be acquired through or under that signature, unless the party against whom it is sought to retain or

enforce payment of the bill is precluded from setting up the forgery or want of authority."

By sect. 60 of the Act, the banker *on whom a bill payable to order on demand is drawn* who pays the bill in good faith and in the ordinary course of business is to be deemed to have paid the bill in due course, though the indorsement has been forged or made without authority.

By sect. 78, a cheque is defined as a "bill of exchange drawn on a banker payable on demand," so that it is clear that sect. 60 applies to cheques. It would, moreover, appear clear that this section would be a good defence to the other bankers on whom the six cheques were drawn and who cashed those cheques for the defendants. As regards the seventh cheque drawn on the defendants themselves a different question arises which it will be convenient to dispose of first. It was decided upon a former Act, 16 & 17 Vict. c. 59, s. 19, containing very similar words to sect. 60, that the banker upon whom a cheque was drawn payable on demand to the order of S. & Co. was justified in paying a cheque indorsed "S. & Co. *per* S. K., agent." *Charles v. Blackwell* (1 C. P. D. 548; C. A. 2 C. P. D. 150), on the ground that the words "which purport to be indorsed by the person to whom the same shall be drawn payable" included the case of an indorsement *per pro*, and therefore that payment of a cheque so indorsed was payment as between the plaintiffs and the defendants, the drawers of the cheque.

It was, however, pointed out by Mr. Jelf for the plaintiff that the words of the Act there in question were not identical with those of sect. 60. The difference is this, that in sect. 19 of the former Act there were not the words "where the banker pays the bill in good faith and in the ordinary course of business."

But inasmuch as that section is not repealed, and it is admitted that there was no absence of good faith on the part of the defendants, and inasmuch as *Charles v. Blackwell* expressly holds that an indorsement *per pro*. does purport to be an indorsement by the person to whom the cheque is drawn payable, I think that the defendants would if they had paid the bill within the meaning of sect. 19, have paid it "in due course" within the meaning of sect. 60 of the later Act; and also paid its amount within the "sufficient authority" contemplated by sect. 19 of the former Act.

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But in the present case there was no actual payment of the cheque in question. The defendants, no doubt, placed it to the credit of Shakeshaft, and treated it as cash in their account with him. I can find nothing in either Act making this equivalent to a "payment of the bill" within the meaning of sect. 60 of the later Act, or "payment of the amount of such draft" within the meaning of sect. 19 of the former Act, so as to bind the lawful owner of the cheque. If the moment after they had placed the cheque to the credit of Shakeshaft, the plaintiff had appeared at the Bank, and claimed the cheque, as fraudulently indorsed, it seems to me that they could not with any regard to the true meaning of language have said, "We have *paid* Shakeshaft the amount of that cheque," or "We have paid that cheque in the ordinary course of business." In the case of *Charles v. Blackwell*, the bankers who were held to have paid the cheque had actually parted with cash to its amount, a very different thing from placing it to the credit of a customer without inquiring as to his authority to indorse. On these grounds I think that *Charles v. Blackwell* does not apply, and that the case of the seventh bill drawn on the defendants must be governed by the Act of 45 & 46 Vict. c. 61 only.

By sect. 73 of this Act all the provisions of the Act applicable to a bill of exchange payable on demand are applied to a cheque. I can find nothing in the Act to prevent the application of sects. 24 and 25 of the Act in the present case as regards the seventh cheque; and I therefore think that those sections apply, and that the defendant had either by virtue of sect. 19 of the earlier Act, or by sect. 60 of the Act of 1882 no right to hold that cheque as against the plaintiffs, or to deal with it in any way short of actual payment, his signature having under the circumstances been "*wholly inoperative*" within the meaning of sect. 24.

I come now to sect. 82, which is contended applies in favour of the defendants as regards all the cheques. I think it does not apply to any of them, for several reasons.

First, as regards four of the cheques; they were not "crossed cheques" at all when received by the defendants. Sect. 82 applies only to a banker, who receives payment of a cheque "crossed generally, or specially to himself." These

words are in my opinion only applicable when the banker who claims the benefit of the section has received a cheque *already* crossed, and not where he takes an uncrossed cheque, and places it to the credit of a customer, and afterwards stamps it with a direction such as that placed on those cheques, for his own purposes, to his own bankers, and forwards it to them for collection. But there are two other objections made to the application of sect. 82, not only as regards the uncrossed cheques, but also as to those three which were crossed "and Co."

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First, that in the present case the defendants did not receive payment of the cheques "for a customer;" and, secondly, that they did not receive payment of them for a customer "without negligence."

As to the first of these objections, I think the argument of Mr. Jelf for the plaintiff was well founded. I think that the Act was intended to protect bankers only in cases where they had *merely* received payment of a crossed cheque for a customer, but that it was not intended to cover the case of a banker, making himself the indorsee of a cheque, especially of a cheque indorsed by his own customer, with notice of that customer's limited authority, so as to dispense with the necessity of all inquiry in such a case.

If the banker in such a case chooses at once to treat the cheque as cash as between himself and his customer, I think that when he afterwards receives payment from the banker on whom the cheque is drawn, he does so for himself, and not "for the customer," within the meaning of sect. 82; and that at all events he does not "*only* receive such payment," but something materially different and more important as between him and the rightful owner of the cheque.

But, even assuming that I am wrong in this view, I am of opinion upon the facts of this case that there was negligence here on the part of the defendants as between them and the plaintiff.

It is clear, I think, that the "negligence" contemplated in sect. 82, must mean the neglect of such reasonable precautions as ought to be taken with reference to the interests, not of the customer, who purports to have the authority, but of the principal, whose authority he purports to have, the

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section being framed wholly with reference to the liability of the banker to the "true owner" of the cheque, and not with reference to his liability to his customer.

It was contended by the defendants that the mere fact that the indorsement was a *per pro.* indorsement, could not be considered any evidence of negligence, because *Charles v. Blackwell* decides that an indorsement *per pro.* is an indorsement purporting to be that of the person in whose favour the cheque is drawn.

But that case is not, nor is sect. 19 of 16 & 17 Vict. c. 9, upon which it was decided, applicable to any banker, except the banker upon whom the cheque is drawn. Nor is sect. 60 of the present Act (see *Ogden v. Benas*, 9 L. R. C. P. 513; and *Bobbett v. Pinkett*, 1 Ex. D. 368). But without further considering whether the words "without negligence," in sect. 82, would be negatived by the mere fact that a *per pro.* indorsement was taken without inquiry, as equivalent to the indorsement of the party in whose favour the cheques were drawn, I am of opinion that in the circumstances proved in the present case, the defendants (even assuming that they received payment for a customer) did not "only" (that is, merely) "receive payment," but that they did so without taking due and reasonable precautions in the interest of the plaintiff, and therefore not "without negligence," and so took a course, which as against them left them in possession of a bill, the indorsement on which was a "wholly inoperative signature," within the meaning of sect. 24. Whatever may be the effect of taking a cheque so indorsed, if it stood alone, I think that the conduct of the defendants in this case was negligent. The party who indorsed it was himself their customer; they knew he was a commercial traveller; they knew the name and address of his employer; nothing would have been easier than to inquire as to the extent of his authority; the manager and the other employés of the bank knew that the indorsement was in his handwriting. The manager himself candidly answered that when they took the cheque, they took the risk of Shakeshaft being a dishonest person. It did not at the time occur to him that it was dangerous; but he saw it now. In fact, the cheques were taken as cash, without any reference to the manager; but

he knew of it immediately, and that they were indorsed *per pro*.

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In these circumstances I think it would be carrying the protection of bankers far beyond the intention, or the words of the legislature, if I were to hold the defendants to be entitled to retain the proceeds of these cheques as against the plaintiff. I think that the plaintiff has never ceased to be the rightful owner: and the defendants took them without any justification. The only case which I can find which seemed to me to tell at all in favour of the defendants' contention is *Charles v. Blackwell*; but the case of *Matthiessen v. London & County Bank*, 5 C. P. D. 7, requires notice; and in that case it was held that sect. 12 of 39 & 40 Viet. c. 81, of which sect. 82 is practically a re-enactment, applies to the case of a banker, who *merely* collects the proceeds of a cheque for a customer; but that was not the case of an indorsement *per pro*, but of a forgery by one Maddie, who was *not* the customer of the defendants, for whom they had collected the money. Moreover, Lindley, J., in his judgment in that case (at p. 17), points out the very distinction relied upon by the plaintiff's counsel in this case, when he says, "The legislature says if you the bank *have collected only* the proceeds of the cheque for your customer, we will not render you responsible for the proceeds, when you have dealt with it in the only way in which as a matter of business you could deal with it. If you have done any thing more, if you have applied it to your own use, that is another matter."

In the present case it was perfectly optional with the defendants whether they treated the cheques in question as their own or not. They chose to do so in a case where by inquiry they might have ascertained that their customer was committing a fraud, and where, in my opinion, they ought to have made such inquiry. I do not think that this is a case which would have fallen within the decision of *Matthiessen v. London & County Bank*, inasmuch as sect. 12 of the Act, upon which that case was decided, also requires the absence of negligence, which in that case there was no ground to impute, there being nothing in that case to call attention to the want of authority of the indorsee, and the bankers having no reason to dispute the right of the customers for whom they collected the proceeds.

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On these grounds I feel bound to give judgment for the plaintiff for the sum which he claims—viz., 105*l.* 1*s.* 6*d.*, with costs.

S. F. Taylor.

Reed, Lovell & Reed.

WILLS, J.

HARSTON v. HARVEY.

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November 17.

A. was a judgment creditor of C. B. wrote to A. a letter in the following terms (so far as is material). "If C. leaves in your hands the order of Messrs F., drawn upon Messrs. R. for 250 Eight per Cent. Preference Shares, &c., I will obtain within one month from this date, with the sanction of C., a loan for him of 1000*l.* upon said order, and pay that sum to you against the delivery of said order."

C. left the order in A.'s hands, and sanctioned the proposal contained in the letter. A. then wrote to B. as follows:—"C. brought me your letter on the 27th, and he has

THIS was an action to recover money alleged to be payable under an agreement.

Leverson for the plaintiff.

Murphy, Q.C., and *R. O. B. Lane*, for the defendant.

The facts and arguments fully appear from the judgment.

WILLS, J.—A person named Caldwell, being in want of money and being known to the defendant, applied to the defendant to raise him a loan of 1000*l.* Some persons were at that time endeavouring to form a limited company, to be called the City of Mexico and Tuxpan Railway Company, Limited, and in the event of its being formed Caldwell would have been entitled to 250 shares. His expectation was that it would be very speedily formed and the shares issued at once upon formation. He explained these facts to the defendant, who promised Caldwell to obtain for him within a month a loan of 1000*l.* upon the security of the shares. As between the defendant and Caldwell this was a gratuitous undertaking. The defendant has sworn, and I believe him, that he undertook to do so as an act of friendship and without reward. Caldwell asked him for a letter to show to the plaintiff, and I think it must be taken, though the question was not asked of

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given me his written sanction to your obtaining the loan of 1000*l.* for him referred to in that letter, and we shall be glad to hear that everything is in order." Held, that assuming A.'s letter to B. to be a final acceptance of the offer contained in B.'s letter to A., there was consideration moving from A. to support B.'s promise, such consideration being the implied undertaking on the part of A., when he received the order, to keep it till required for the purpose of being handed over to the person who would advance the 1000*l.* on its security. But held also, that A.'s letter to B. was not an acceptance of the offer contained in B.'s letter to A., and that the two letters did not therefore constitute a contract.

the defendant, that the defendant knew that the letter would be used to obtain an advantage of some sort from the plaintiff; but there is no evidence to show that he knew anything more definite. The plaintiff had, in fact, recovered judgment against Caldwell for 14,000*l.*, and had presented a petition to make him bankrupt. These facts, however, were unknown to the defendant. The defendant thereupon wrote the letter upon which this action is brought, and which is in the following terms:—

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"LONDON, 27th March, 1884.

"DEAR SIR,

"If Mr. Josiah Caldwell leaves in your hands the order of Messrs. Buchanan and Ferrar drawn upon Messrs. A. and W. Ricardo for 250 Eight per Cent. Preference Shares of the City of Mexico and Tuxpan Railway Company, Limited, of 20*l.* each, like the form hereto attached, I will obtain within one month from this date, with the sanction of Mr. Caldwell, a loan for him of one thousand pounds (1,000*l.*) upon said order, and pay that sum to you against the delivery of said order.

"Yours faithfully,

"GEORGE C. HARVEY.

"E. F. B. Harston, Esq."

On the back of the letter was a copy of a form of order in the words and figures following:—

"LONDON, March 12th, 1884.

"Order No. 40.—To Messrs. A. and W. Ricardo, 11, Angel Court, Throgmorton Street, London, E.C.

"DEAR SIRS,

"250 8 per Cent. Preference Shares.—Pay to bearer as and when you receive the same under the irrevocable power of attorney given to you by us, dated this 12th day of March, 1884, two hundred and fifty of the 8 per cent. preference shares of the City of Mexico and Tuxpan Railway Company, Limited, referred to in clause A of article 6 of the articles of agreement, dated this 12th day of March, 1884, made between us and the trustee acting on behalf of the City of Mexico and Tuxpan Railway Company referred to in said agreement.

"Yours faithfully,

"(Signed) BUCHANAN AND FERRAR."

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Caldwell procured from Buchanan and Ferrar an order signed by them and in identical terms with the above instrument, and took it to the plaintiff, along with some other similar orders relating to other undertakings, and wrote underneath it the words "I sanction the above, Joshua Caldwell;" and the plaintiff, in consideration of Caldwell so doing, agreed to procure, and, in fact, procured the dismissal of his petition. Four days later, viz., upon the 31st March, a firm of solicitors, of which the plaintiff is a member, wrote to the defendant as follows:—"Caldwell, this gentleman brought me your letter of the 27th inst., and he has given me his written sanction to your obtaining the loan of 1,000*l.* for him referred to in that letter, and we shall be glad to hear that everything is in order." The defendant, who had not kept a copy of his letter, replied on the 1st of April by asking for a copy of that document. This was furnished on the 2nd of April. On the 3rd of April the defendant wrote:—"I am in receipt of your letter of the 2nd enclosing copy of my letter to Mr. Harston, with Mr. Caldwell's written sanction at the foot; but I must have a written undertaking from Mr. Caldwell that he will agree to any terms which I may obtain the loan upon. I understood he was to have given you this." In reply to this letter the plaintiff wrote, on the 3rd of April, informing the defendant that he had, on the faith of the letter of the 27th March, consented to the dismissal of the petition against Caldwell. The rest of the correspondence is immaterial. The question to be decided is whether the defendant contracted with the plaintiff to raise a loan within a month and to hand the proceeds to the plaintiff against the order upon Messrs. Ricardo. No one, I think, can say that the question is free from doubt; but, after most careful consideration, I have come to the conclusion that there is no such contract. It was strenuously urged upon me that whether the document in itself constituted a contract or not, there was consideration for the alleged promise of the defendant in the fact that Caldwell obtained forbearance upon the document. I think this is a fallacy. The document was, no doubt, intended to be used with the plaintiff for some purpose beneficial to Caldwell, but that will not alter its construction. The same argument would apply if it had been in terms a mere expression of expectation; in which case the fallacy would be transparent.

The document must speak for itself, and, looking to the circumstances under which it was given, the very fact that no mention of such consideration was inserted would lead my mind to the conclusion, apart from construction, that forbearance on the part of the plaintiff was not intended to be a consideration as between plaintiff and defendant, but that the one gave and the other received the letter for whatever it was worth in itself. I proceed therefore to examine the document more closely, and for the present I postpone the question whether or not enough took place after the letter was handed to the plaintiff to turn the offer it contained into a contract, and I assume for the purpose of the present discussion that the offer of the defendant is to be treated as duly accepted by the plaintiff. I also leave out of consideration for the present the question whether the condition contained in the words "with the sanction of Mr. Caldwell" has been performed, and consider the document as if those words were not in it. What the defendant undertakes to do is plain enough. It is to obtain within a month for Caldwell a loan of 1,000*l.*, upon the security of the order for shares, and to pay that sum to the plaintiff against the delivery of the order. The question is whether any consideration for that promise is to be collected from the document—in other words, whether there is anything which, in order to give effect to the other parts of the arrangement, must necessarily be done by the plaintiff. If there is, if he has subjected himself to any obligation towards or at the request of the defendant, then, as considerations cannot be measured, there is a sufficient burden imposed upon him to furnish a consideration for the promise of the defendant, and the document is a contract. Now, what was it that both plaintiff and defendant contemplated that the defendant should do? He was to raise 1,000*l.* for Caldwell upon the security of the order, and this was the only means by which he could get the 1,000*l.* which he was to hand over to the plaintiff. It is obvious that he could not do this unless the order was in his possession, or under his control, or unless he could bind himself to some one else to hand it over, or otherwise give a title to it. The whole arrangement was contingent upon the order being deposited in the hands of the plaintiff. When that was once done the defendant was to set to work to raise the loan of the 1,000*l.* upon the order, and he was to

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hand the 1,000*l.* to the plaintiff, not unconditionally, but against delivery by the plaintiff of the order. Is it possible to suggest that the parties to this arrangement did not really mean that for a month, until the defendant was ready with the 1,000*l.*, the plaintiff was to hold the order for the purpose of enabling the loan to be carried out? Would it not have been contrary to the intention of both parties, for instance, if the plaintiff had sold the order to a third party, and when the defendant had bound himself to the lender of the money to hand the order to him, which (inasmuch as the order was not in his possession) the defendant must have done if the loan was to be raised at all, had told him that he had found another use for it, and did not propose to take the 1,000*l.* or hand over the order? The plaintiff and defendant meant something by this letter. The plaintiff certainly meant that the defendant should take steps to borrow the 1,000*l.* for Caldwell upon the security of the order, and inasmuch as that could not be carried out unless he himself consented to hold the order (when deposited with him) for the purpose of enabling that loan to be effected, I think it follows that the plaintiff must have intended to undertake that when the order should come to his hands he would hold it subject to that purpose, and that the defendant must have intended that the plaintiff should so hold it. If this be so, there is necessarily to be implied from the document an undertaking by the plaintiff to hold the order, upon receiving it for that purpose, and that is, in my opinion, a sufficient consideration for the promise of the defendant to raise the money, and to hand the 1,000*l.* to the plaintiff against the delivery of the order. It is said, however, for the defendant, that the agreement, if it be one, is subject to the condition contained in the words, "with the sanction of Mr. Caldwell," and that it was necessary that Mr. Caldwell should know and sanction the particular terms upon which the loan might ultimately be contracted. I confess that I do not feel the force of this argument. I see no difficulty in a general authority by Caldwell to the defendant to raise the 1,000*l.* upon any terms. It is a very large and general authority. It is said that is too vague to mean anything; but would there be any difficulty in giving effect, say, to a general authority in a power of attorney to contract loans for the grantor of the power? The power of a member

of a firm to borrow money for the firm, though limited to the purposes of the firm, is just as extensive and as vague, so far as respects all the terms and details of the loan. Caldwell wrote beneath the agreement—"I sanction the above." This must be taken to mean that he sanctioned that for which alone his sanction was required, viz., the loan of 1,000*l.* for him upon the order. I think it was a general and unlimited authority, and I see no difficulty in giving effect to it. The objections, therefore, which were chiefly discussed before me in the argument appear to me to fail, but a question still remains which goes to the root of the whole matter. Was there an acceptance of the offer contained in that letter communicated to the defendant before fresh terms were insisted upon? In my opinion there was not. No one can say that the mere handing to the plaintiff of that letter constituted a contract. It was open to the plaintiff to act upon it or not, as he chose. He did act upon it, and there can be no doubt of his intention to accept it. But an intention to accept an offer is nothing unless communicated in due course to the person making the offer. The first communication which the defendant received from the plaintiff was the letter of the 31st of March. That letter informed him that Caldwell had brought to the plaintiff his letter, and had sanctioned the proposal that he should obtain a loan from him, but not of the fact that he had deposited with him the order—the essential thing, of course, before the plaintiff was likely to act upon the letter—and under these circumstances I think the defendant would be likely to understand, as I believe he did in fact understand, the phrase "We shall be glad to learn that everything is in order," as a preliminary inquiry rather than an intimation that the offer was already acted upon and now accepted by the plaintiff. I can see nothing in that letter which would have entitled the defendant to complain if the plaintiff had followed it up by another saying that he declined the proposal contained in the letter of March 27. The answer of the defendant bears out this view, that this was the construction that he put upon the letter of the 31st of March, for he asks for a copy of what he had written. This copy was furnished, with no further intimation of what had been done. The defendant then wrote asking for a written sanction by Caldwell in more definite terms than the one

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already given. I have already expressed my opinion that the one already given was abundantly sufficient, and really amounted to what the defendant was asking for. But that is nothing to the purpose. The substance of the defendant's letter of the 3rd of April is—"What you already have from Caldwell is too vague, and I require something in different terms." Such an alteration of the original proposal constituted a new offer, as to which either it was not accepted, or the condition was not complied with. Upon this ground it appears to me clear that the plaintiff's case fails, and, I think it only right to add, fails upon a ground which entirely justifies the defendant, morally as well as legally, in repudiating the liability sought to be imposed upon him. A defence is raised by the pleadings, but was hardly seriously insisted upon, that the projected company had never been registered nor the shares issued. But it seems clear upon the evidence that both the plaintiff and the defendant were fully aware that such was the case. The order annexed to the letter of the 27th of March, 1884, directed Messrs. Ricardo to hand to the bearer the shares "as and when received," and there can be no doubt that the document signed by Messrs. Buchanan and Ferrar satisfied the description contained in the letter. For the reasons above assigned I give judgment for the defendant, with costs; but I stay execution for a fortnight, and, if within that fortnight the case is set down for appeal, until the hearing of the appeal.

R. C. Want.

Snell, Son & Greenip.

LOPES, J.

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November 20.

GREEN AND ANOTHER v. BRAND AND ANOTHER.

A trader insured his stock in trade and other effects. These were destroyed by fire. He assigned the policies to trustees on trust to pay and

THIS was an interpleader issue in which the plaintiffs affirmed and the defendants denied that a sum of 28*l.* 1*s.* 5*d.* in the hands of the Scottish Provincial Insurance Company was the property of the plaintiffs against the defendants. By an assignment made on the 11th of April, 1883, one Lithgow, divide the monies received thereunder among all his creditors rateably, and to pay the balance, if any, to himself. Held, that the assignment was not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under 50*l.*

a boot and shoe dealer, whose business premises had been burnt down, and whose stock in trade and other effects were insured in several insurance offices, assigned to the plaintiffs all his claims and interest under his policies on trust to receive the insurance monies and to pay and divide the same among all his creditors mentioned in a schedule to the assignment, and all his other creditors (if any) rateably in proportion to the amount of their respective debts, and to pay the balance, if any, to Lithgow. The defendants' names appeared in the schedule of creditors, and they were in fact creditors of Lithgow, but no communication was made to them of the fact that the assignment had been executed; such communication was made to the other creditors, who assented to the arrangement. On June 11th, 1883, the defendants recovered judgment against Lithgow for 28*l.* 1*s.* 5*d.* They subsequently sought to attach so much of the monies payable by the Scottish Provincial Insurance Company in respect of the fire at Lithgow's premises, as was sufficient to discharge their debt; thereupon the plaintiffs claimed under the assignment all the monies payable by the company, and this issue was directed.

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Harper, for the defendants, relied on the judgment of Mellor, J., in *Spencer v. Slater* (L. R. 4 Q. B. D. 13), as showing that the effect of the deed was to defeat and delay creditors whose debts were under 50*l.*

McCall, for the plaintiff, cited *Boldero v. London & Westminster Loan, &c., Company* (L. R. 5 Ex. D. 47), in which the deed was held good, although it was a stronger case than the present. In that case, too, *Spencer v. Slater* was cited and distinguished. The vice of the deed there was the resulting trust in favour of the debtor, in case any creditor refused his assent to the deed.

LOPES, J.—I do not think that this assignment is rendered void by the statute 13 Eliz. c. 5. The deed differs in its provisions from the deed in *Spencer v. Slater*. If there were any conflict between that case and the later case of *Boldero v. London, &c., Company*, I should act on the latter case.

LOPES, J., and a C. J.

INDERWICK v. LEECH.

1884.

November 27.

A lessor is not deprived of any part of the ordinary damage recoverable on a breach of covenant by the lessee to deliver up the demised premises in good repair, by reason of the lessor effecting structural alteration in the premises after the determination of the lease.

THIS was an action for damages by landlord against tenant for breach of covenant to deliver up the demised premises in repair. The defendant paid 20*l.* into Court.

The premises at the determination of the tenancy were admittedly out of repair, but the plaintiff, on resuming possession, proceeded to commence certain structural alterations therein, pulling down and reconstructing part of the premises. No evidence was adduced as to the time when the plaintiff determined on these alterations.

Lumley Smith, Q.C., and E. F. Silvester, for the plaintiff.

Bremner, for the defendant, contended that the jury in assessing the damages were entitled to take into consideration the fact that the landlord was altering and reconstructing the premises. The damages recoverable should be such a sum as it would cost to do such repairs as would be practically useful to the landlord. He cited *Rawlings v. Morgan* (84 L. J. C. P. 185).

LOPES, J.—The premises being out of repair at the end of the term the plaintiff then had a vested right of action for compensation. Nothing that has since occurred can make any difference to, or affect, that right to compensation. There must be judgment for the plaintiff for an amount to be ascertained by a surveyor.

Few & Co.

J. Vernon & Co.

HUDDLESTON, B.

HERMAN v. ROYAL EXCHANGE SHIPPING COMPANY AND PATTON, JUNR., & CO.

1884.
December 3.

THIS was an action for damages for non-delivery of a box of hardware shipped at New York under a bill of lading.

The plaintiff was in the habit of shipping goods from New York for carriage to England by the "Monarch Line," the defendants, the Royal Exchange Shipping Company, being the owners of the steamers on that line. The bills of lading were always headed "Monarch Line of Steamships," and sometimes the words "extra steamer" were added, and sometimes not. The defendants, John Patton, Junr., & Co., were the managers and agents in London of the "Monarch Line." Patton, Vickers & Co., of New York, were the agents in New York of John Patton, Junr., & Co., and acted as agents in respect of the shipment of goods there upon steamers running on the "Monarch" line. On the 24th of December, 1882, the box in question (together with other goods of the plaintiff) was shipped on board the steamer *Kingdom* at New York, under a bill of lading of which the terms, so far as is material, were as follows:—

"Shipped in apparent good order and well-conditioned by H. Herman in and upon the steamship called the *Kingdom*, now lying in the port of New York, and bound for London, one box, hardware, to be delivered from the ship's deck (where the shipowner's responsibility shall cease) in the like good order and well-conditioned at the port of London, unto H. Herman, No. 21, Dod Street, Limehouse, E., London, or to his assigns, freight unless prepaid to be paid at London. . . . Freight, if payable at port of destination, to be paid in cash without deduction, and before delivery of any portion of the goods specified.

"In case the whole or any part of the goods specified herein be prevented by any cause from going in the said steamer the shipowner is only bound to forward them by succeeding steamers of this line.

A company owned a line of steamers called the "Monarch Line," running between New York and London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods in a steamer at New York, and received a bill of lading made out in the ordinary form given by the company for goods shipped on their steamers, save that it had the words "extra steamer" added after the words "Monarch Line of steamships." At London an overside release for the goods was signed and given by the company's agents to A., and the freight received by them from A. Held, in an action by A. against the company for non-delivery of the goods, that the company were estopped from saying that the contract of shipment was not made with them.

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"In witness whereof the master or agent of the said ship hath affirmed to three bills of lading, all of this tenor and date, the one of which bills being accomplished the others to stand void.

"F. LAVERGUE,
"For the Agents.

"Dated Dec. 24, 1882."

In the margin at the head of the bill of lading were the words "Monarch Line of Steamships," "Extra Steamer," and underneath them the words "Agents at New York, Patton, Vickers & Co.; at London, John Patton, Junr., & Co.; at Liverpool, John Patton, Vickers & Co."

Lavergue was a clerk in the office of Patton, Vickers & Co. at New York.

On the arrival of the *Kingdom* in the port of London, one of the plaintiff's servants took the bill of lading to the London office of the Royal Exchange Shipping Company, and an overside release for (*inter alia*) the box in question was endorsed on the bill of lading by one Wright, a clerk in the employment of Patton, Junr., & Co. The plaintiff's London manager also went to the same office and paid the freight, and obtained a receipt for freight signed as follows:—"For John Patton, Junr., & Co., Managers, A. Wright, 7, Fenchurch Avenue, E.C."

A. Wright gave evidence to the effect that when John Patton, Junr., & Co. signed as managers they signed as managers for the Monarch line.

The plaintiff was unable to obtain delivery of the box from the *Kingdom*, though many applications were made for it.

The defence of the Royal Exchange Shipping Company was that the *Kingdom* was not their vessel, and that the bill of lading was not signed by their agent on their behalf. They proved that the *Kingdom* had been chartered by Patton, Vickers & Co. acting on behalf of John Patton, Junr., & Co. from the owners, Thomas & Co., of Liverpool, by a charter-party made on the 18th of November, 1882, for a voyage from New York to London for a lump sum of 3,375*l.* freight, payable on delivery of the cargo in London. The charter-party contained the following clause:—"The master shall sign bills of lading as presented without prejudice to this charter, any difference

between chartered and bill of lading freight being settled on clearance; if in charterer's favour by captain's draft payable three days after arrival at port of discharge; if in steamer's favour in cash less cost of insurance; charterer's liability to cease on cargo being shipped, steamer having an absolute lien on the cargo for all freight, dead freight and demurrage." Also the following clause:—"Steamer is to be consigned to charterer's agents, John Patton, Junr., & Co., London, or their nominees at any other port of discharge, paying 5*l.* 5*s.*, under a penalty of 50*l.*"

An authority in the following terms was given to Patton, Vickers & Co. by the master of the *Kingdom* :—

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"NEW YORK,
"December 19th, 1882.

"MESSRS. PATTON, VICKERS & CO.,
"City,

"DEAR SIRs,

"I hereby authorize you to sign bills of lading as agents of the owners of the steamship *Kingdom*, for all goods intended to be shipped on board that vessel for London and ports beyond, but same must be in accordance with the dock receipts issued by you.

"Yours truly,

"Master Steamship *Kingdom*,

"H. A. ROBERTS,

"Master."

Jelf, Q.C., and *A. G. M'Intyre*, for the plaintiff, contended that either the plaintiff's contract was with the defendant company, or, if not in fact with them, that at any rate the defendant company had so conducted themselves that they could not be heard as against the plaintiff to say that the contract was not with them.*

Finlay, Q.C., and *J. G. Barnes*, for the defendants, contended that the contract of carriage is made *primâ facie* with the owner of the ship, and that the words "extra steamer"

* The plaintiff's counsel did against the defendants, Patton, not at the trial persist in the claim Junr., & Co.

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showed or ought to have shown to the plaintiff that the defendant company were not in fact the owners of the *Kingdom*.

The following authorities were cited:—*Gilkison v. Middleton* (2 C. B. N. S. 134; 26 L. J. C. P. 209); *Sandeman v. Scurr* (L. R. 2 Q. B. 86); *Omoa, &c., Company v. Huntley* (L. R. 2 C. P. D. 464); *Hayn v. Culliford* (L. R. 3 C. P. D. 110); *Wagstaff v. Anderson* (L. R. 5 C. P. D. 171).

December 12.

HUDDLESTON, B., after stating the facts, and saying there was nothing to indicate to the plaintiff the actual facts with reference to the chartering of the steamer, except the use of the words, "extra steamer," continued: Since yesterday I have referred to the case of *Newberry v. Colvin* (1 C. & F. 284), where Lord Tenterden uses these words: "Two propositions of law are clear as applicable to a case like this. The first is that in the common case of goods shipped on board a vessel belonging to a person of which the shipment is acknowledged by a bill of lading signed by the master, if the goods are not delivered the shipper has a right to maintain an action against the owner of the ship; the other, which is equally clear, is this, that if the person in whom the absolute property of the ship is vested charters that ship to another for a particular voyage, although the absolute owner provides the master, crew, provisions, and everything else, and is to receive from the charterer of the ship a certain sum of money for the use and hire of the ship, an action can be brought only against the person to whom the absolute owner has chartered the ship, and he is considered the owner *pro tempore* during the voyage for which the ship is chartered. It cannot be maintained against the person who has let out the ship on charter, viz., the absolute owner."

The case of *Newberry v. Colvin* is referred to in the judgments in *Wagstaff v. Anderson* (L. R. 5 C. P. D. 171, C. A.), and Thesiger, L. J., says, "It is open to the plaintiffs to negative the presumption of the liability of the shipowner in two ways—either by showing that the transactions between the shipowners and the defendants were such as really put the defendants for that particular voyage in the position of the shipowners, according to the principles laid down in *Newberry v. Colvin*, or that, although the transaction between the shipowners and the defendants did not put the defendants in the

position of shipowners, yet they had so conducted themselves or so contracted with the shippers of the goods as to make themselves personally responsible."

In this case I shall not go into the question whether under the charter-party the defendants were the owners *pro tempore* of the vessel, but I base my decision on the ground that they have so conducted themselves or so contracted with the shippers of the goods as to make themselves personally responsible. The bill of lading, which is in a printed form, used by the defendants, is evidently a bill drawn up by the defendants for their Monarch line of steamers. The name of the defendant company's agents appears in the margin beneath the words "Monarch Line of Steamships." It is clearly intended to be a contract between the shippers of goods and the defendants as owners of the vessel on which they are carried. It is obvious from that document that one of the contracting parties contracts as owner. Reliance is, however, placed by the defendants upon the words "extra steamer." Those words no doubt indicate that the steamer is not an ordinary steamer on the Monarch line, but the meaning is "We have not got a Monarch line ship for this voyage, but we have got another ship which will do equally well to carry your goods; we have got an extra steamer running on our line." The matter does not, however, rest here; on the arrival of the vessel in London the plaintiff's servant goes to the office of the managers and agents of the defendant company, and an overside release is endorsed on the bill of lading by a clerk in the employment of the managers and agents; and further, the plaintiff's manager goes to the office himself, pays the freight there as he had done on all previous occasions, and obtains a receipt for the freight signed by the same clerk. Under these circumstances I think that the defendant company are personally liable in this action.

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Judgment for the plaintiff.

D. E. Chandler.

W. A. Crump & Son.

LOPES, J.

1884.

December 6.

CLEMSON v. TOWNSEND.

A bill of sale given by way of security for payment of money contained an agreement by the grantor to pay principle and interest up to demand within twenty-four hours after demand in writing. Held, that the bill of sale was void under sect. 9 of the Bills of Sale Act, 1878, Amendment Act, 1882, as not being in accordance with the form prescribed by that statute, the agreement to pay twenty-four hours after demand not being an agreement to pay within a stipulated time.

FURTHER consideration of an interpleader issue, tried at the Derby Summer Assizes, 1884.

The question was whether a bill of sale given by one Morley to the plaintiff to secure the repayment of a sum of 772*l.* 12*s.*, was void for non-compliance with the statutory form prescribed by the Bills of Sale Act, 1878, Amendment Act, 1882 (45 & 46 Vict. c. 43). The following were the material provisions of the bill of sale:—

“And the said James Knight Morley doth further agree and declare that he will within twenty-four hours after demand in writing duly pay to the said John Clemson the principal sum aforesaid, together with the interest due thereon up to the date of such demand, and until such demand will pay to the said John Clemson interest on the said principal sum by equal half-yearly payments on the 9th of July, and the 9th of January, until payment thereof.”

There was also a provision that if Morley should at any time make default in payment of any of the moneys secured at the time appointed for payment thereof, or in performance or observance of any of the covenants or agreements thereafter contained, or should become bankrupt, or compound with his creditors, or if any event mentioned in the seventh section of the Bills of Sale Act, 1878, Amendment Act, 1882, should happen, the whole of the principal moneys thereby secured, with interest due thereon up to that time, should become immediately payable, without the necessity for any demand of payment being made. There was also a provision that it should be lawful for Clemson on the happening of any of the events mentioned in the seventh section of the aforesaid statute to seize or take possession of all or any of the said chattels and things thereby assigned, and to remove the same, or remain in possession thereof, without removing them, and at any time after such seizure, or taking possession, subject to the provisions of the statute aforesaid, to sell the said chattels and things. The bill of sale con-

cluded with the following words :—" Provided always, that the said chattels hereby assigned shall not be liable to seizure, or to be taken possession of by the said John Clemson for any cause other than those specified in sect. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882."

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Bigham, Q.C. (with him *Hugo Young*), for the plaintiff, attempted to distinguish the case from *Hetherington v. Groome*, L. R. 13 Q. B. D. 789, on the ground that the twenty-four hours gave the grantor time to look about him.

Mellor, Q.C., and *W. Graham*, for the defendant.

LOPES, J.—I do not think "twenty-four hours after demand in writing" is a stipulated time, any more than "upon demand made in writing." In both cases the time for payment is to be ascertained by nothing but the mere choice and volition of the holder of the bill of sale. *Hetherington v. Groome* is, therefore, in point against the plaintiff. I express no opinion, as it is unnecessary for me to do so, whether the second ground on which the bill of sale in *Hetherington v. Groome* was held void, would apply to the wording of the bill of sale in this case, and render it void.

DENMAN, J.

REG. v. THE CHARNWOOD FOREST RAILWAY
COMPANY.

1884.
November 14
and 15.

PREROGATIVE writ of *mandamus* to compel the defendants to register the prosecutor Fearn as a shareholder in their company, and to issue certificates to him.

A prerogative writ of *mandamus* will not lie to compel a company to register as a holder of shares therein, a person to whom they have issued

Glen, for the prosecutor.

Douglas Kingsford, for the defendants.

certificates in respect of such shares where the company have issued prior certificates in respect of such shares to someone else, without clear proof that the person to whom the last certificates were issued has a better title than the person to whom the earlier ones were issued, even though the person holding the earlier certificates has not been entered in the company's register as the holder of such shares.

When such a writ is asked for, the company are not estopped from relying upon the actual facts.

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THE CHARN-
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PANY.

December 15.

The facts and arguments sufficiently appear from the judgment of the learned judge.

DENMAN, J.—This case was heard before me without a jury on the 14th and 15th of last month. The prosecutor Fearn had obtained a rule absolute for a prerogative writ of *mandamus* upon affidavits, which were not before me. The substance of the *mandamus* was as follows:—It recited that the Charnwood Forest Railway Company was a joint stock company, incorporated by an Act passed after the date of the Companies Clauses Act, 1845, for the purpose of carrying on an undertaking within the meaning of that Act, and as such bound to keep a register of shareholders containing the names and addresses of the several persons entitled to shares in the company, together with the number of shares to which each shareholder should be entitled, and that on demand of the holder of any share the company should cause a certificate of the proprietorship of such share to be delivered to such shareholder; and that such certificate should have the common seal of the company affixed thereto, and that such certificate should specify the share in the undertaking to which such shareholder should be entitled; that the prosecutor was entitled to 370 shares, but was not entered in the register as holder; that he had demanded a certificate of proprietorship to be delivered to him, and to be registered as the holder of 370 shares, but that the company wholly neglected and refused to enter, or cause to be entered, his name in the register as holder of 370 shares, or to issue or deliver to him a certificate.

The writ then went on to command as follows:—"That you do enter or cause to be entered in the register of shareholders of you, the said company, the name of the said William Frederick Fearn as the holder of 370 shares in your said company, and do issue and deliver to the said William Frederick Fearn a certificate in respect of such shares, under the seal of your said company, or that you show cause to the contrary," &c. The return, after generally denying in the first three paragraphs that the prosecutor was entitled to "the said 370 shares referred to in the writ," or to be registered, or to have a certificate in respect of the "said 370 shares," went on (in paragraphs 4 to 8) to allege that the

name of Joseph Firbank was entered in the register as the holder of "the said 370 shares," that a certificate of them had been delivered to him; that he was entitled to the said shares as true owner thereof, that the company had no power to enter the prosecutor's name in the register as holder, or to issue a certificate to him in respect of the "said 370 shares." To this return there was a traverse which alleged, first, that the return was insufficient in law; secondly, by way of plea, denied all the allegations in the return *seriatim*.

Before going further it may be mentioned that it was supposed when the case was called on that Order LIII. r. 9 applied, and that I had jurisdiction to try it without a jury. My attention was not called to Order LXVIII. rr. 1 and 2. These appear to me to raise a doubt whether Order LIII. r. 9 is an "express provision," within the former rule to the extent of authorizing a trial without a jury in the case of a prerogative *mandamus*; but on calling the attention of Master Mellor to the point, I was furnished by him with a somewhat analogous case, not reported, in which the Court held that the rules relating to the new mode of raising questions of law otherwise than by demurrer apply to prerogative *mandamus*, though not among the rules specially referred to in Order LXVIII. r. 2. Moreover, the parties both agreed that if there be any objection to this mode of trial, it should be waived; I therefore feel bound to proceed to give judgment both upon the questions of law, and upon the questions of fact raised before me on the trial.

The facts as I find them are as follows:—

The defendant company is a railway company, incorporated and regulated by Acts of 1874 and 1876, which incorporated the Companies Clauses Act, 1845. The capital of the company is 159,000*l.*, in 15,900 shares, of 10*l.* each. On the 21st of December, 1882, the prosecutor, W. F. Fearn, received from the secretary of the company, one Tremayne, two certificates, sealed with the company's seal, and signed, "E. F. Tremayne, Secretary." One of these certificates was in these words:—"This is to certify that William F. Fearn, of Whitelands, &c., is the registered proprietor of 310 shares, of 10*l.* each, Nos. 8,501 to 8,810 inclusive, upon which 10*l.* per share have been paid in the Charnwood Forest Railway Company, subject to the regulations of the said company.

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Given, &c., on the 18th of December, 1882." The other certificate was for 690 shares, numbered from 8,811 to 8,863, and from 10,266 to 10,900. The shares sought to be registered in this case are, as was admitted by the prosecutor's solicitor, those numbered from 10,531 to 10,900.

The prosecutor's name had never been registered for any of these shares; and the prosecutor's case rested entirely upon the fact of his receipt of the certificates above-mentioned, sealed and signed, as described in December, 1882; and it was contended that those certificates estopped the company from denying that the prosecutor was a shareholder entitled to registration, and to a fresh certificate for the balance of shares still held by him. After certain dealings with others of the shares mentioned in the certificate of December, it was however admitted by the prosecutor that he himself originally obtained the shares in question from one Kensington on the 30th of September, 1882, and that he failed to give any proof of the lodging of the transfer with the company, or indeed of the transfer itself. He said that the consideration for the transfer from Kensington was by way of security for money lent, and upon the balance of a running account; but he admitted that he had never seen any deed of transfer, and he called no one to prove its existence, or the delivery of it for registration, as provided by sect. 15 of the Companies Clauses Act. It is unnecessary to say more upon this part of the case than that I am not satisfied that either the prosecutor, or Mr. Rogers, his solicitor, who was also, and still is Kensington's solicitor, explained this transaction in such a way as to corroborate the prosecutor's case, to the effect that there ever was any real *bonâ fide* transfer of shares from Kensington to Fearn. But even if there was such a transfer, I do not think that there is any proof of Fearn having taken the proper steps to have his name registered as a shareholder by lodging such a transfer with the company. This alone, in my opinion, is fatal to the prosecutor's claim now to have a certificate or registration of his name.

It was so held even in an action for a *mandamus*, in *Copeland v. North-Eastern Railway* (6 E. & B. 277); and the section (15) of the Companies Clauses Act, 1845, which was there held applicable, is also applicable to the case of a

prerogative *mandamus*. This was the first objection relied upon by the defendants, and I give judgment for the defendants on this ground. I think it right, however, to state the view I take of the other grounds of defence stated in the return to the *mandamus*.

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The facts in connexion with these were as follows:— On the 26th of July, 1882, the secretary of the company, Tremayne, sent to one Firbank, a contractor, who was actually making the line, a certificate, sealed with the company's seal, and precisely similar in form to that subsequently in December sent to the prosecutor, certifying Firbank to be the registered proprietor, *inter alia*, of the shares 10,531 to 10,900, now sought to be appropriated to the prosecutor. This certificate had remained in Firbank's possession ever since, and was produced by his solicitor at the trial. Without going further, I am of opinion that this state of facts makes it impossible to hold that a prerogative *mandamus* will lie to compel the company to appropriate the shares in question, to the prosecutor. All that the Companies Clauses Act says upon the subject is what is contained in sect. 12, viz. :—"That the certificate shall be admitted in all courts as *primâ facie* evidence of the title of such shareholder, his executors, &c., to the shares therein specified." But where a precisely similar certificate is produced, given to another person, dated a few months earlier than that relied upon, and specifying the same identical shares by number, I think it cannot be held that the holder of the later certificate is entitled to compel the company to insert his name on the register, or to give him a fresh certificate for some of the same shares, without at least a very clear proof that his title is a better one than that of the holder of the earlier certificate, and that it is not the office of a prerogative *mandamus*, at all events, in the absence of such proof, to assist him in any way. On this ground, also, I feel bound to give judgment for the defendants; and this I do, quite independently of the evidence given on the part of the defendants as to the actual condition of the company's registers.

I think it right, however, to state what, in my judgment, are the facts relating to these, and the conclusions I draw from them, as it is possible that the Court of Appeal may not adopt the views I have already explained, and yet may

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think that, upon the facts, the defendants have proved the matters set up in their return affirmatively, and given an affirmative answer to a case, which might otherwise in their opinion have been decided for the prosecutor. I refer now to the allegations in the return :—" That the name of Joseph Firbank is entered in the register as the holder of the said 370 shares, and that Firbank is entitled to the said shares as owner." The evidence bearing upon this part of the case was as follows :—Two folio books were produced at the trial by the defendants as registers of shareholders. The first of these had printed on the cover and back in large gold letters, "Register of Shareholders, 1874." The second was similarly lettered, substituting 1883 for 1874. The former appeared to have been regularly kept and sealed by the chairman at all the half-yearly meetings, from September 30, 1875, down to November 19, 1881, inclusive. From that time it has a much more questionable appearance. The next half-yearly meeting appears to have been on the 3rd July, 1882.

At the end of a list of names, shares, &c., there is the usual form of statement, to the effect that it was sealed ; but the chairman's name is left in blank, and no seal is affixed, but the secretary's signature is added. The other two lists in this book are still more questionable ; and if it be necessary for me to come to any conclusion upon the question, whether they were intended by the secretary, or whoever drew them up, to be the authentic register, or that they were in fact the register of the company for any period subsequent to July, 1882, I come to the conclusion that they were not. I think they were mere drafts, intended to be afterwards used, in order to make out the register. The first of them has no date, either at the head of the pages, or at the end, no seal, no signature ; and the last of them has not even the form at the end in blank, which is found in the others. I do not think that I should be justified in relying upon these in any way as evidence in favour of the defendants ; nor do I think that the second book, marked 1883, which contains one list only, though headed on each page, "Register of Shareholders," sealed at the ordinary half-yearly meeting, held on the 22nd of December, 1883, can be relied upon by the defendants as evidence of Firbank's title. It was not sealed

nor signed by the secretary; and there was evidence that the secretary, who had absconded, had made several mistakes in these lists in entering the names of more than one person as proprietors of the same shares, and that not all the books or papers belonging to the company were forthcoming. The name of Firbank did not appear in any of the registers antecedent to that of July 3, 1882, nor did that of Fearn. Indeed, neither case set up that there had been any transfer to those parties registered before the 9th of August, 1882. I think, therefore, that the case must be considered wholly without reference to any entries in the register of shareholders, and that the defendants have failed to prove by the books just described their affirmative statements in their return that Firbank is on the register, &c. There was another book, indorsed "Register of Transfers, 1874," which was tendered in evidence for the defendants, and admitted, subject to objection. I do not find any authority for holding that this was an admissible document, and I do not found my judgment upon it. But I do think that the defendants are entitled to judgment:—first, on the ground that there is no evidence that the prosecutor ever became a *bonâ fide* or actual transferee of these shares; and secondly, that even if he did, there is no evidence that he entitled himself to be registered. I also think that no estoppel applies against the company so as to prevent them from saying that Firbank, who claims registration, has, at all events, a right which they have no business to postpone to that of Fearn, who did not obtain his certificate until five months after Firbank, and who relies for title upon an unregistered transfer, itself dated, according to his own statement, two months after the certificate granted to Firbank, of which there is no proof. The cases relied upon by Mr. Glen were mainly cases in which it was held that an action or claim for damages would lie against a company whose secretary had improperly given a certificate, upon the faith of which the party complaining had acted to his detriment; such cases were, *In re Bahia and San Francisco Railway Company* (3 L. R. Q. B. 534); *Hart v. Frontino, &c., Company* (5 L. R. Exch. 111); and *Shaw v. Port Phillip, &c., Company* (53 L. J. Q. B. D. 869), in which last case the certificate had been forged by the secretary, and it was held that the company were liable as for the fraud of

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an agent in the ordinary course of his employment. But these cases are no authorities for holding that where two certificates for the same numbered shares have been delivered to two different persons, the Court can grant a peremptory *mandamus* to either, especially to the holder of the later certificate, claiming title under a transfer admitted to be later in date than the prior certificate, to have his name placed upon the register in respect of those shares. Other cases were cited for the plaintiff, in which an action of *mandamus*—not a prerogative *mandamus*, was held according to the facts to lie; in *Webb v. Commissioners of Herne Bay* (5 L. R. Q. B. 642), where the Commissioners were held liable to apply any funds in their possession to pay interest on debentures illegally issued, and in the hands of an innocent assignee for value; but the Court there decided no question involving the right of a third party in respect of those or any other debentures, which distinguishes the case entirely from the present. *Ward v. South-Eastern Railway Company* (2 E. & E. 812) is more analogous to the present case. That was an action of *mandamus* under the Common Law Procedure Act of 1854, s. 58, to enter a transfer to plaintiff in the register of transfers, and to enter his name on the register of shareholders, and to cause a certificate to be given him. In that case the plaintiff's name had been placed on the register and removed by the company for reasons which did not show a better title in the person whose name was substituted, and the Court held that the company had no right to act. In the present case, the only proof given by the prosecutor was the certificate he relies on; but the company having previously issued a certificate to Firbank for the same shares have, I apprehend, no right, in the absence of further proof, to take a step tending to nullify the prior contract, nor can the Court compel them to do anything of the kind. The case of *Reg. v. Carnatic Railway* (8 L. R. Q. B. 299), so far from being an authority for the prosecutor, appears to me to tell the other way. It was a *mandamus* to enforce an application under the Married Woman's Property Act, 1870, to register a married woman as a shareholder, and the Court held that in such a case, by reason of the provisions of the Act, the company must investigate the title, and will be compelled by *mandamus* to register, unless a flaw be shown. But in giving judgment in that case

Blackburn, J. (at p. 301), says: "It is clear that this Act imposes on a company a burden which no Act before has cast upon them." This clearly refers to the peculiar wording of the Act, viz., that they are to register the shareholder "as a married woman entitled to her separate use," followed by the words "and it shall be the duty of such directors or managers to register such shares or stock accordingly."

The case of *Reg. v. Shropshire Union Railway* (8 L. R. Q. B. 420) raised no such difficulty as exists in the present case; there the company refused to register, on the ground that their own trustee had improperly transferred shares to the party demanding registration. The Court awarded a peremptory *mandamus* on the ground that the company, by improperly giving their trustee certificates imputing that he had an indefeasible title, had precluded themselves from setting up their right to the shares as *cestuis que trustent*, the certificates themselves, as against the company, conclusively showing the trustee to be the owner of the shares, and so enabling him to commit frauds. I think it impossible to apply the doctrine of estoppel in this case. It may be that in some other form of proceeding, by which Firbank's rights would not be affected, assuming that the prosecutor can show that he has really sustained damage by the delivery to him of the certificate of the 23rd of December, he may have a remedy against the defendants to the extent of such damage; but I am of opinion that he is not entitled to a peremptory *mandamus* upon the facts proved before me, and I therefore give judgment for the defendants, with costs.

W. H. Myers.

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December 10.

A. was the registered owner of a trade-mark registered in Oct. 1878, as a new trade mark under 38 & 39 Vict. c. 91, in respect of the goods comprised in class 5 in the 1st schedule to that Act, viz., "unwrought and partly wrought metals used in manufacture." The trade-mark consisted of a figure of Neptune, with a trident, seated on a rock in the sea, with the word "Neptune" in the background. B., in 1880, registered in respect of wire (an article comprised in class 5) a trade-mark consisting of a trident, the letters F. G., and the word "Neptune." The word "Neptune" was an essential part of A.'s trade-mark by which his goods were known in the market. B. had dealt long and largely in wire. A.'s dealings in wire were infinitesimally small. Held, that A.'s mark was a trade mark within sect. 10 of 38 & 39 Vict. c. 91; and that the word "Neptune" was an essential part of it, and that at the end of five years after the date of its registration A. acquired an indefeasible title to it, and the right to its exclusive use.

THIS was an action for an injunction to restrain the defendant from using in the sale of galvanized wire, steel, or iron, any mark resembling, or only colourably differing from, or adopting any material part of the plaintiff's trade mark, and from using the word "Neptune" in connection with the sale of galvanized wire or other galvanized steel or iron.

The plaintiff carried on business as a manufacturer and exporter of galvanized iron goods with the different Australian colonies. This business, together with its goodwill and trade mark, he acquired in September, 1883. The trade mark consisted of a figure of Neptune seated on a rock, with a trident in his hands, and the word "Neptune" written across the background. This trade mark had been registered in October, 1878, by the then owners of the business, as a new trade mark under the Trades Marks Registration Act, 1875 (38 & 39 Vict. c. 91), for the whole of Class 5 of the classes mentioned in the 1st schedule to that Act.* The plaintiff was now the registered owner of the trade mark. The plaintiff's predecessors in title in the business had used the trade mark in connection with galvanized iron, in which they carried on an extensive business; but its use upon wire had been infinitesimally small; their business in wire only amounting to about seven tons of wire in the course of ten years. The defendant was the agent, in England, of a firm of Felten and Guilleaume, manufacturers, in Germany, of iron goods; particularly of wire, which they exported very largely to the Australian colonies. They used, and had for many years used, in connection with their exports of wire, a trade mark consisting of a trident, the letters F. G., and the

* Class 5. Unwrought and bolt and rod, sheets, and boiler partly wrought metals used in and armour plates, hoops, wire; manufacture, such as iron and lead-pig: rolled, sheet; copper, steel, pig or cast, rough, bar and zinc, gold in ingots.

and rail, including rails for railways,

word "Neptune." In the year 1880 the defendant registered this trade mark in respect of *wire* only.

The evidence showed that Felten and Guilleaume's dealings with the Australian colonies were very large, and that if Neptune wire had been asked for there the purchasers would have been supplied with wire of their manufacture. In 1883 they had exported wire of the value of 228,000*l*. The action was tried at the Liverpool summer assizes, 1884, and his lordship reserved the case for further consideration in London.

Charles Russell, Q.C., French and Lawrence for the plaintiff.—The word Neptune is the essential part of the plaintiff's trade mark, and of the defendant's. The plaintiff has registered his trade mark in respect of the whole of Class 5 under sect. 2 of the Trade Marks Registration Act, 1875 (38 & 39 Vict. c. 91), and they have therefore, under sect. 2 of that Act, an indefeasible title.*

R. H. Collins, Q.C., and T. Cutler for the defendants.—"Neptune" cannot be an essential part of the plaintiff's trade mark. It is a mere fancy word, and such a word cannot, under sect. 10 of the Trade Marks Registration Act,

* *Section 2.* A trade mark must be registered as belonging to particular goods, or classes of goods, and when registered shall be assigned and transmitted only in connection with the goodwill of the business concerned in such particular goods or classes of goods, and shall be determinable with such goodwill, but subject as aforesaid, registration of a trade mark shall be deemed to be equivalent to public use of such mark.

Section 3. The registration of a person as first proprietor of a trade mark shall be *prima facie* evidence of his right to the exclusive use of such trade mark, and shall after the expiration of five years from the date of such registration, be conclusive evidence of his right to the exclusive use of such trade mark, subject to the provisions of this Act, as to its connection with the goodwill of a business.

Section 10. For the purposes of this Act—

A trade mark consists of one or more of the following essential particulars; that is to say,

A name of an individual or firm printed, impressed, or woven in some particular and distinctive manner: or

A written signature or copy of a written signature of an individual or firm: or

A distinctive device, mark, heading, label, or ticket; and there may be added to any one or more of the said particulars, any letters, words, or figures, or combination of letters, words, or figures: also

Any special and distinctive word or words, or combination of figures or letters used as a trade mark before the passing of this Act may be registered as such under this Act.

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1875, be registered, except as an old trade mark. The plaintiff's trade mark is registered as a new one. Sect. 3 of that Act only gives a right to the *whole* trade mark registered, or if that is not so, only to that which is an essential particular—and "Neptune" is not an essential particular. Unless the plaintiff shows that it is, the case of *Orr Ewing v. Johnson* (L. R. 7 App. Ca. 219) shows that he cannot call on defendant to justify his conduct. *Re Braby* (L. R. 21 Ch. D. 223) shows that the view taken by the Court is that a man cannot, by registering in a class, prevent others from using similar trade marks for articles in that class, and the case of *Re Pelly, Son & Jones* (46 L. T. 381 (note), and 51 L. J. Ch. 689 (note)), shows that under some circumstances two or more persons may be registered for the same trade mark in the same class.

French in reply.

A. L. SMITH, J.—I have struggled to escape from the effect of the statute, for I am afraid the judgment I am about to pronounce will cause very great hardship to the defendant.

It is manifest, from the evidence which has been given before me, that the plaintiff's trade mark has been used upon galvanized iron for a considerable number of years, but that its use upon wire has been infinitesimally small. It amounted to some seven tons or so of wire in some ten years. On the other hand, it has been proved to my satisfaction that the defendants are very large manufacturers of wire, and that they had used their trade mark with the word "Neptune" on it for many years; such a business had they done, that, in 1883, it culminated in 228,000*l.* a year, and the result of this action will be to prevent the defendants from carrying on their trade in a way in which they have carried it on for very many years, which in no respect prevented the plaintiff or his predecessor from carrying on their trade. The plaintiff alleges he has an indefeasible title under the statute, but that he does not claim at common law at all, and I think that if he did he would have fared very badly, for he has given practically no evidence of user.

The first question which arises is, Is the plaintiff's mark a trade mark within sect. 10, of 38 & 39 Vict. c. 91? Has

it a distinctive device? I am of opinion it has. Has it added to that distinctive device, "any letters, words, or figures, or combination of letters, words, or figures"?—Yes. I ask myself, is this a trade mark which could be registered, and come within the provisions of sect. 10? It seems to me that it is. It was argued, however, that "Neptune" is nothing more than a fancy word, and that it could not therefore under this Act be used as a trade mark; but I cannot hold that, because on the evidence before me, given by the defendant himself, and the witnesses called, the word "Neptune" is, in my opinion, the real essence of the trade mark, whereby the plaintiff's goods are known in the market. I think, therefore, that this is a trade mark within the meaning of sect. 10, of 38 & 39 Vict. c. 91. What, therefore, is the position of the plaintiff? Sect. 2 enacts that "a trade mark must be registered as belonging to particular goods, or classes of goods" . . . and "subject as aforesaid" (that is, as to assignment), "registration of a trade mark shall be deemed to be equivalent to public use of such mark." The meaning of this is, that if the mark itself is of such a description as to satisfy the statute (and I have held that the plaintiff's mark in this case does), and if the registration be of such a kind as to satisfy the statute (and in this case it does do so), then the registration shall be equivalent to public use of the trade mark. The plaintiff's predecessors did in October, 1878, register their trade mark in the class for unwrought, and partly wrought metals, used in manufacture. They then had a proper trade mark registered, and they must be deemed to have had a public use of it prior to the registration of that trade mark.

Now we will proceed to sect. 3. That section enacts that registration "shall after the expiration of five years from the date of registration be conclusive evidence" of the right of the proprietor "to the exclusive use of such trade mark." Now I cannot do away with an Act of Parliament, though I think in this case that it operates very hardly on the defendant. The plaintiff has registered his trade mark in accordance with the Act—has had it for five years on the register, and has therefore under the statute an indefeasible title.

Then the plaintiff comes into Court, and says "The defendant has interfered with my right." What is he doing?

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He is putting the word "Neptune" on wire; he is using and threatening to use a mark, which is of all importance to the plaintiff. It seems to me, holding as I do that the word "Neptune" is a material and distinctive part of the plaintiff's trade mark, that the defendants are infringing the material and distinctive part of the plaintiff's trade mark, and that therefore so far the plaintiffs are right.

The argument on behalf of the defendants, that there has been no public use of this trade mark as applied to wire, is cut away from the defendants by reason of sect. 2, which says that registration alone shall be equivalent to public use.

Lastly, it was said that two persons can be registered for the same mark in the same class. I do not decide that. It is sufficient for me to say that the plaintiff has placed on the register a trade mark belonging to a particular class of goods for which he is entitled to be registered, that that mark has been on the register for five years, and that therefore he has an indefeasible title. The plaintiff has made out his case, and I must therefore give him judgment for an injunction, with costs.

*Byrne & Lucas.**Van Sandau & Cumming.*

 MATHEW, J.

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November 3.

BARRON AND ANOTHER v. EHLERS, SEEL & CO.

The title of a trustee in bankruptcy to the bankrupt's property relates back, under sect. 11 of the Bankruptcy Act, 1869, to the original act of bankruptcy, although composition proceedings were taken in the first instance, which were afterwards superseded by bankruptcy. When such a supersession takes place, the title of the trustee in bankruptcy is prior to that of a creditor, who has seized and sold the debtor's goods, with notice of the original act of bankruptcy.

THIS was an interpleader issue directed to try whether the plaintiff, the trustee in bankruptcy of Kauffman and Gates, was entitled to a sum of 100*l.* as against the defendants, execution creditors of Kauffman and Gates.

On July 11th, 1883, Kauffman and Gates committed an act of bankruptcy by closing their place of business to prevent execution being levied on their goods. On July 12th, Ehlers, Seel & Co., having recovered judgment against Kauffman and

Gates for 163*l.* 19*s.* 9*d.*, delivered to the sheriff of the City of London a writ of *elegit*, directing him to seize and hold the goods of Kauffman and Gates till the said judgment debt and interest should be levied. Kauffman and Gates kept their premises closed until July 16th, and so prevented the sheriff from seizing under the writ goods and chattels on those premises. On that day (July 16th) Kauffman and Gates filed a liquidation petition, and at a meeting of creditors, by an extraordinary resolution, it was resolved to accept a composition of 7*s.* 6*d.* in the £, the composition to be secured by an assignment, under Rule 281 of the Bankruptcy Rules, 1870, of all the debtors' goods to Wendt and Charles, as trustees. The sheriff was restrained by an order of the Court from seizing the goods of the debtor under the writ of *elegit* until after the registration of the resolutions. Ehlers, Seel & Co. attended the meetings in the liquidation, but did not prove their debt, or assent to the extraordinary resolution, and in the debtors' statement of affairs the amount of their debt was not correctly stated. Ehlers, Seel & Co., on September 11th, gave notice to Wendt and Charles that the writ of *elegit* had been lodged with the sheriff. On September 12th, the resolution was registered. On the 17th of September the goods on the premises aforesaid were assigned to, and taken possession of by, Wendt and Charles. On the 20th of September the sheriff seized the goods under the writ of *elegit*. Wendt and Charles claimed them; the sheriff interpleaded, and a special case was ordered to decide whether Ehlers, Seel & Co. were entitled to the goods seized as against Wendt and Charles, 100*l.*, the proceeds of sale of the goods, being paid into the hands of the sheriff by Wendt and Charles. On the hearing of this special case, on November 26th, 1883, the Court (*Day and Smith, JJ.*) decided (49 L. T. N. S. 806) that Ehlers, Seel & Co. were entitled to the goods and their proceeds as against Wendt and Charles. On Nov. 28th Kauffman and Gates were adjudicated bankrupt under the last sub-section of sect. 126 of the Bankruptcy Act, 1869, and the plaintiff, as their trustee, claimed the proceeds of the goods, which were still in the hands of the sheriff. The sheriff again interpleaded, and this issue was directed.

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Sidney Woolf, for the plaintiff.—Our title relates back to the act of bankruptcy which was committed on the 11th of

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July, 1883. The defendants are not protected under sect. 95, sub-sect. 3, because they had notice of this act of bankruptcy, as well as of the second one, on July 16th. The fact that the adjudication superseded and put an end to the composition proceedings does not prevent our title relating back to the original act of bankruptcy. He cited *Ex parte Duignan, In re Rissell* (L. R. 6 Ch. App, 605), and *Ex parte Cooper, In re Baum* (L. R. 10 Ch. D. 313; *per James, L. J.*, at p. 318).

Hilbery for the defendants.—The title of the trustee cannot be allowed to relate back to the original act of bankruptcy in such cases as this: *Ex parte Charlton* (L. R. 6 Ch. D., at p. 52; *per James, L. J.*). It would lead to most mischievous results if it did. Again, the decision of the Court in our favour on the previous interpleader issue prevents the present plaintiff from disputing our title.

November 14.

MATHEW, J. (after stating the facts).—The plaintiff contended that there was nothing to prevent the ordinary relation back of the trustee's title to the act of bankruptcy under sect. 11 of the Act of 1869, and that, as ordinarily in bankruptcy proceedings, the title of the trustee relates back to the act of bankruptcy, so it must do so, when after liquidation proceedings have been commenced a subsequent adjudication and appointment of trustee in bankruptcy takes place. In my opinion the plaintiff is right in his contention. The language of the Act is quite plain. The defendants were throughout aware of the act of bankruptcy, and the decision on the previous interpleader issue can in no way affect the plaintiff's rights.

Judgment for the plaintiff.

R. Raphael.

F. W. & H. Hilbery.

MATHEW, J.,

SCOTT v. THE CLIFTON SCHOOL BOARD.

THIS was an action by an architect to recover from the defendant board payment for services rendered to them by him in preparing plans for their schools, and superintending the erection thereof. The action came on for trial at the Carlisle Summer Assizes, 1884, and was reserved for further consideration in London.

Gully, Q.C., and *Henry*, for the plaintiff.

Mattinson, for the defendant.

The facts and arguments sufficiently appear from the judgment of the learned judge.

The following authorities were cited in argument :—*Mayor of London v. Charlton* (10 L. J. Ex. 75); *Arnold v. Mayor of Poole* (12 L. J. C. P. 97); *Payne v. Guardians of Strand Union* (15 L. J. M. C. 89); *Lamprell v. The Billericay Union* (18 L. J. Ex. 282); *Diggle v. London & North-Western Railway Company* (19 L. J. Ex. 308); *Homersham v. Wolverhampton Waterworks Company* (20 L. J. Ex. 198); *Austin v. Guardians of Bethnal Green* (L. R. 9 C. P. 91); *Clark v. The Cuckfield Union* (21 L. J. Q. B. 349); *Hunt v. The Wimbledon Local Board* (L. R. 4 C. P. 48); *Young v. The Corporation of Leamington* (L. R. 8 Ap. Ca. 517).

December 18. MATHEW, J.—In this case the plaintiff, who is an architect, sued the School Board for the district of Great and Little Clifton to recover payment for services rendered by him in preparing plans for the defendants' schools, and superintending their erection.

The defendants denied their liability, and by counter-claim sought to recover damages from the plaintiff for negligence in the performance of his duties as architect.

At the trial it was agreed by counsel that the counter-cover for his services rendered, although the amount claimed was over 50*l.*, and the contract with him was not under seal.

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Rule 7 of Schedule 3 of 33 & 34 Vict., c. 75 (The Elementary Education Act, 1870) provides as follows :—"The appointment of any officer of the board may be made by a minute of the Board signed by the chairman and countersigned by the clerk (if any) of the Board, and any appointment so made shall be as valid as if it were made under the seal of the Board." The plaintiff was appointed architect to a School-Board under a minute signed by the chairman of the Board, and communicated to the plaintiff by the clerk of the Board, and orders for the preparation of plans for erecting schools, and superintending their erection, were subsequently given to him by minute of the Board, properly signed and communicated to him. Held, that the plaintiff was an "officer" of the Board within the meaning of the above rule, and that he was entitled to re-

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MATHEW, J.

claim should be abandoned, and that the sole question in the cause should be whether or not the defendants were liable for the plans upon which the defendants' schools were erected, the defendants insisting that the orders given the plaintiff were not binding upon them, as they had not been formally issued under the seal of the Board. It was arranged that if the liability of the defendants was established, the judgment should be entered for 90*l*. Upon the argument of the case on further consideration, the cases on the subject of contracts by corporate bodies from *Clarke v. The Guardians of Cuckfield Union* (21 L. J. Q. B. 849), down to *Young v. The Corporation of Leamington* (L. R. 8 Ap. Ca. 578), were discussed at length, and the defendants relied upon such of the cases as afforded instances of the strict application of the rule in favour of corporations. Although by sect. 30 of the Elementary Education Act, 1870 (33 & 34 Vict. c. 75), a school board is a corporate body, with perpetual successors, and a common seal, further provisions are made with reference to the proceedings of the Board, which would seem to render the cases relied upon by the defendants inapplicable. The Board is a representative body, intended to provide at meetings of its members for the conduct of the affairs of the Board, and to have the proceedings at such meetings duly recorded by minutes, which by sect. 30, sub-sect. 4 of the Act are made receivable in evidence in all legal proceedings without further proof. In this case the orders given the plaintiff were agreed to by resolution of the Board, and were duly recorded in the minutes. If it were necessary for my decision, I should hesitate to regard the cases relied upon by the defendants where contracts by corporate bodies were held to require to be under the common seal, to be a safe guide in the present case (or indeed in any other case), where the contract was for a purpose incidental to the performance of the duties of the corporate body, and its necessity was shown by proof that the corporation, with full knowledge of its terms, and of all the facts, had acted upon and taken the benefit of its performance. With respect to school boards, the purpose intended to be served by requiring the seal of a corporate body to be used would seem to be secured by other means under the statute in question. But I think that the plaintiff is entitled to recover on another ground, viz., by

virtue of the provisions of sect. 30, sub-sect. 6,* and the regulation contained in the third schedule of the Act. By rule 7, in that schedule, "the appointment of any officer of the Board may be made by a minute of the Board, signed by the chairman, and countersigned by the clerk (if any) of the Board; and any appointment so made shall be as valid as if it were made under the seal of the Board." The plaintiff was duly appointed architect to the Board, under a minute signed by the chairman of the Board, and communicated to him by the clerk of the Board, and the subsequent orders for the execution of the plans were given by minute of the Board, properly signed and communicated in a similar manner. It was contended for the defendants that an architect was not such an officer of the Board as was contemplated by the regulation, inasmuch as it could not be supposed that his services were intended to be more than temporary.

I cannot adopt this construction. By the terms of the minute the plaintiff was appointed the architect of the Board; and although after the erection of the schools in the Clifton district his duties might not be onerous, there was no reason to suppose that it was intended that he should not continue to act whenever his services were necessary. Further, the regulation is intended to be one of general application; and in large towns where there were many schools there might well be the necessity for the appointment of an architect as a permanent official of the Board. On these grounds I give judgment for the plaintiff, with costs.

Wood & Wootton.

Speechly, Mumford, & Co.

* Section 30, sub-section 6. The rules contained in the third schedule to this Act with respect to the proceedings of school boards and the other matters therein contained shall be observed.

WILLS, J., and a C. J.

DEBENHAM AND OTHERS v. KING'S COLLEGE,
CAMBRIDGE.1884.
December 16
& 17.

No custom exists by which surveyors engaged in compensation cases on the compulsory purchase of property are entitled to be remunerated on a per-centage of the sum awarded, according to Ryde's scale.

THIS was an action by a firm of surveyors to recover remuneration for services rendered by one of their firm as a surveyor.

Mr. Farmer, a member of the plaintiffs' firm, had been employed by the defendants to inspect and report upon the value of certain property of the defendants, consisting of Purfleet Wharf, Blackfriars, which the London, Chatham, and Dover Railway Company, in 1882, gave notice of their intention to purchase compulsorily of the defendants under the provisions of the Lands Clauses Consolidation Act, 1845.

The inspection and report were for the purpose of enabling Mr. Farmer to appear as a witness on behalf of the defendants, when the arbitration as to the value of the premises took place between the Railway Company and the defendants. The property in question was let by the defendants for a term of years, of which, in 1882, seventy years were unexpired, at a yearly rent of 600*l*. Mr. Farmer inspected the premises, made his report, and appeared and gave evidence at the arbitration. The value of the property was assessed by the arbitrator at 20,000*l*.

The plaintiff's firm brought this action to recover a sum of 121*l*. 16*s*. Of this sum 3*l*. 8*s*. was charged for giving evidence, and the remaining sum of 118*l*. 13*s*. was charged for inspecting and reporting upon the value of the property. No objection was made to the 3*l*. 8*s*. charge, and it was paid into Court. The 118*l*. 13*s*. was based on "Ryde's Scale of Fees for surveyor's charges," and the plaintiffs' contention was that (1) the defendants had expressly authorized, and, if not, had ratified, their employment at that rate of remuneration; (2) that there was a custom or usage entitling surveyors in such cases to be remunerated by a per-centage on the amount of the award according to Ryde's scale; (3) that the sum claimed was in fact a reasonable one for the services rendered.*

Ryde's scale is a per-centage calculated on capital sums;

the per-centage varies up to 10,000*l.* On 10,000*l.* and up to 12,000*l.* the per-centage is five guineas in the 1,000*l.* On 12,000*l.* the per-centage amounts to a sum of seventy-three guineas. The scale does not deal specifically with the per-centage on capital sums over 12,000*l.*

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On behalf of the plaintiff, surveyors were called to prove the alleged custom, but they all admitted that Ryde's scale would not be applicable where very large sums were involved. They further admitted that if they were dealing for the first time with a solicitor or surveyor whom they did not know to be familiar with compensation business they should think it right to inform him of Ryde's scale, and of their intention to charge according to it.

R. V. Williams for the plaintiffs.

Bosanquet, Q.C., and *J. G. Witt*, for the defendants.

WILLS, J.—I cannot leave any question as to custom to the jury. There is no evidence of any such custom as would bind the public. It is true the witnesses *say* there is a custom; but they also depose to that which is quite inconsistent with the existence of a custom; viz., that it would be their proper course to inform any one previously unknown to them of their intention to charge according to Ryde's scale.

T. G. Bullen.

F. & T. Smith & Sons.

* As to (1), it is enough to say that the jury found that the defendants had authorized or ratified the employment on "Ryde's Scale;" as to (3), the jury found that 11*l.* 13*s.* was an unreasonably large charge; that a sum of twenty guineas, which the defendants had paid into Court, was insufficient, but that they (the jury) had no materials before them which would enable them to say what was a reasonable charge.

TRIAL AT BAR BEFORE

Lord COLERIDGE, C. J., GROVE, J., and HUDDLESTON, B.

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June 13.

ATTORNEY-GENERAL *v.* BRADLAUGH.

The oath of allegiance set out in sect. 2 of 31 & 32 Vict. c. 72, cannot be taken by a person who has no belief in a Supreme Being. If, therefore, a duly elected member of Parliament who has no belief in a Supreme Being goes through the form of taking such oath, he is none the less liable to be sued for penalties, under sect. 5 of 29 Vict. c. 19 (The Parliamentary Oaths Act, 1866), for sitting and voting without having taken the oath. The fact that a man of full age holds certain views on religious subjects at one time is *evidence* that he holds the same views four years later.

THIS was an information on behalf of the Crown under sect. 5 of 29 Vict. c. 19 (The Parliamentary Oaths Act, 1866), to recover penalties against the defendant, the duly elected member for the borough of Northampton, for sitting and voting in the House of Commons without taking the oath of allegiance set out in sect. 2 of 31 & 32 Vict. c. 72, s. 2 (The Promissory Oaths Act, 1868).

The information was in the following form:—

BETWEEN HER MAJESTY'S ATTORNEY-GENERAL (on behalf of
HER MAJESTY) *Informant,*

and

CHARLES BRADLAUGH *Defendant.*

The 6th day of March, 1884.

BE IT REMEMBERED that Sir Henry James, Knight, Attorney-General of our present Sovereign Lady the Queen, who for our said Lady the Queen prosecutes in this behalf, comes in his own proper person into the Queen's Bench Division of the High Court of Justice on the 6th day of March in this same Sittings, and for our said Lady the Queen gives the Court here to understand and be informed that he the said Attorney-General, on behalf of our said Lady the Queen, demands of Charles Bradlaugh the sum of 500*l.* of lawful money, which he the said Charles Bradlaugh owes to, and unjustly detains from, our said Lady the Queen; for that whereas he the said Charles Bradlaugh having been heretofore elected to serve as a member of Parliament for the borough of Northampton, and being a member of the House of Commons, did afterwards, to wit, on the 11th day of February, in the year of our Lord 1884, vote as such member in the said House without having made and subscribed the oath by "The Parliamentary Oaths Act, 1866," as amended by the "Promissory Oaths Act, 1868," appointed against the form of the said first-mentioned statute as amended as afore-

said, whereby and by force of the same statute as amended as aforesaid, he the said Charles Bradlaugh, for his said offence, became subject to a penalty of 500*l.* of lawful money, and the said sum of money, for his said offence, did forfeit to our said Lady the Queen, and thereby and by force of the said statute as amended as aforesaid an action hath accrued to our said Lady the Queen to demand and have the same of and from the said Charles Bradlaugh, yet the said Charles Bradlaugh hath not paid the said sum above demanded, or any part thereof.

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And the said Attorney-General, for our said Lady the Queen, Second Count. further gives the Court here to understand and be informed that he the said Attorney-General, on behalf of our said Lady the Queen, demands of the said Charles Bradlaugh one other sum of 500*l.* of lawful money, which he the said Charles Bradlaugh owes to, and unjustly detains from, our said Lady the Queen; for that whereas he the said Charles Bradlaugh, having been heretofore duly elected to serve as a member of Parliament for the borough of Northampton, and being a member of the House of Commons, did afterwards, to wit, on the 11th day of February, in the year aforesaid, sit, during a debate after the Speaker had been chosen, without having made and subscribed the oath by "The Parliamentary Oaths Act, 1866," as amended by the "Promissory Oaths Act, 1868," appointed against the form of the said first-mentioned statute as amended as aforesaid, whereby and by force of the same statute as amended as aforesaid he the said Charles Bradlaugh, for his said offence, became subject to a penalty of 500*l.* of lawful money, and the said sum of money, for his said offence, did forfeit to our said Lady the Queen, and thereby and by force of the said statute as amended as aforesaid an action hath accrued to our said Lady the Queen to demand and have the same of and from the said Charles Bradlaugh, yet the said Charles Bradlaugh hath not paid the said sum above demanded, or any part thereof.

And the said Attorney-General, for our said Lady the Queen, Third Count. further gives the Court here to understand and be informed that he the said Attorney-General, on behalf of our said Lady the Queen, demands of the said Charles Bradlaugh one other sum of 500*l.* of lawful money, which he the said Charles Bradlaugh owes to, and unjustly detains from, our said Lady

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the Queen ; for that whereas he the said Charles Bradlaugh, having been heretofore duly elected to serve as a member of Parliament for the borough of Northampton, and being a member of the House of Commons, did afterwards, to wit, on the 11th day of February, in the year aforesaid, on one other occasion vote as such member in the said House without having in this present Parliament and since his said election solemnly and publicly made and subscribed the oath by "The Parliamentary Oaths Act, 1866," as amended by the "Promissory Oaths Act, 1868," appointed at the Table in the middle of the said House, and whilst the full House of Commons was there duly sitting with their Speaker in his chair, against the form of the said first-mentioned statute as amended as aforesaid, whereby and by force of the same statute as amended as aforesaid he the said Charles Bradlaugh, for his said offence, became subject to a penalty of 500*l.* of lawful money, and the said sum of money for his said offence did forfeit to our said Lady the Queen, and thereby and by force of the said statute as amended as aforesaid an action hath accrued to our said Lady the Queen to demand and have the same of and from the said Charles Bradlaugh, yet the said Charles Bradlaugh hath not paid the said sum above demanded, or any part thereof.

Fourth Count.

And the said Attorney-General, for our said Lady the Queen, further gives the Court here to understand and be informed that he the said Attorney-General, on behalf of our said Lady the Queen, demands of the said Charles Bradlaugh one other sum of 500*l.* of lawful money, which he the said Charles Bradlaugh owes to, and unjustly detains from, our said Lady the Queen ; for that whereas he the said Charles Bradlaugh having been heretofore duly elected to serve as a member of Parliament for the borough of Northampton, and being a member of the House of Commons, did afterwards, to wit, on the 11th day of February, in the year aforesaid, on one other occasion vote as such member in the said House without having in this present Parliament, and since his said election, solemnly and publicly made and subscribed the oath by "The Parliamentary Oaths Act, 1866," as amended by the "Promissory Oaths Act, 1868," appointed at the Table in the middle of the said House, and whilst the full House of Commons was there duly sitting with their Speaker in his

chair at such an hour, and according to such regulations as the said House did by its Standing Order direct; that is to say, at any time during the sitting of the said House, before the orders of the day and notices of motions had been entered upon, or after they had been disposed of, and without any debate or business being interrupted for that purpose, against the form of the said first-mentioned statute as amended as aforesaid, whereby and by force of the same statute as amended as aforesaid he the said Charles Bradlaugh, for his said offence, became subject to a penalty of 500*l.* of lawful money, and the said sum of money for his said offence did forfeit to our said Lady the Queen, and thereby and by force of the said statute as amended as aforesaid an action hath accrued to our said Lady the Queen to demand and have the same of and from the said Charles Bradlaugh, yet the said Charles Bradlaugh hath not paid the said sum above demanded, or any part thereof.

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And the said Attorney-General, for our said Lady the Fifth Count, Queen, further gives the Court here to understand and be informed that he the said Attorney-General, on behalf of our said Lady the Queen, demands of the said Charles Bradlaugh one other sum of 500*l.* of lawful money, which he the said Charles Bradlaugh owes to, and unjustly detains from, our said Lady the Queen; for that whereas he the said Charles Bradlaugh having been heretofore duly elected to serve as a member of the Commons House of Parliament for the borough of Northampton, and being a person having no belief in a Supreme Being, and being a person upon whose conscience an oath, as an oath, has no binding force (of all which said matters the said House then had full cognisance and notice by means of the avowal of the said Charles Bradlaugh), did afterwards, to wit, upon the 11th day of February, in the year aforesaid, go through the form of making and subscribing the oath appointed by "The Parliamentary Oaths Act, 1866," as amended by the "Promissory Oaths Act, 1868," and did thereafter, to wit, on the 11th day of February, in the year aforesaid, upon one other occasion, being such member as aforesaid, vote as such member in the said House, and without having made and subscribed any oath, save as aforesaid, against the form of "The Parliamentary Oaths Act, 1866," as amended by the "Promissory Oaths Act, 1868,"

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whereby and by force of the said statute as amended as aforesaid he the said Charles Bradlaugh, for his said offence, became subject to a penalty of 500*l.* of lawful money, and the said sum of money, for his said offence, did forfeit to our said Lady the Queen, and thereby and by force of the said statute as amended as aforesaid an action hath accrued to our said Lady the Queen to demand and have the sum of and from the said Charles Bradlaugh, yet the said Charles Bradlaugh hath not paid the said sum above demanded, or any part thereof.

Wherefore the said Attorney-General of our said Lady the Queen, who, for our said Lady the Queen, in this behalf prosecuteth, prays the advice of the Court here in the premises and due process of law to be made against the said Charles Bradlaugh in this behalf to make him answer to our said Lady the Queen touching and concerning the premises aforesaid.

HENRY JAMES.

The defendant pleaded "Not guilty by statute" (21 Jac. I. c. 4, s. 4).

One of the questions involved in the case was whether the defendant was a person capable of taking the oath at all; and with reference to this question the evidence and arguments appear in the summing up of the Lord Chief Justice.*

Sir H. James, A.-G., Sir F. Herschell, S.-G., Sir H. Giffard, R. S. Wright, and Danckwertz, appeared for the Crown.

The defendant appeared in person.

The following authorities were cited:—*Miller v. Salomons* (8 Ex. 778; 22 L. J. Ex. 169; 17 Jur. 468); *Lancaster and Carlisle Railway Company v. Heaton* (8 E. & B. 952;

* Of the other questions involved, the question as to the validity of the resolution of the House of Commons forbidding the defendant to take the oath, and the question as to whether a person could administer the oath to himself (which the defendant went through the form of doing),

were not decided, as it became unnecessary to decide them. It has, therefore, not been thought desirable to report the case on these points; nor on the question of fact whether the defendant took the oath in accordance with the practice and standing orders of the House of Commons.

27 L. J. Q. B. 195); *The Queen's Case* (2 Brod. & Bing. 284); *Lord Lovat's Case* (18 St. Trials, 617); *Christopher Layer's Case* (16 St. Trials, 158); *Jacobs v. Layborn*, 11 M. & W. 685; *Corporation of Beurdley's Case* (10 Mod. Rep. 151); *Queen v. Muscot* (10 Mod. Rep. 192); *Clarke v. Bradlaugh*, (L. R. 7 Q. B. D. 38; L. R. 8 App. Cas. 354); *Wilson v. De Coulon* (L. R. 22 Ch. D. 841); *King v. Courtenay* (9 East, 246; *King v. Ellis*, 9 East, 252 (*in notis*); *Jackson v. Gridley*, 18 Johnson's Rep. of S. C. of New York, 118.

The 3rd and 5th sections of 29 Vict. c. 19 (Parliamentary Oaths Act, 1866), and the 2nd and 8th sections of 31 & 32 Vict. c. 72, are set out below.*

LORD COLERIDGE, L.C.J.—Now the question that has really to be determined is this: Is Mr. Bradlaugh, or has

* 29 Vict. c. 19, s. 3. The oath hereby appointed shall in every parliament be solemnly and publicly made and subscribed by every member of the House of Peers at the table in the middle of the said house before he takes his place in the said house, and whilst a full House of Peers is there with their speaker in his place, and by every member of the House of Commons at the table, in the middle of the said house, and whilst a full House of Commons is there, duly sitting with their speaker in his chair, at such hours, and according to such regulations as each house may by its standing orders direct.

S. 5. If any member of the House of Peers votes by himself or his proxy in the House of Peers, or sits as a peer during any debate in the said house without having made and subscribed the oath hereby appointed, he shall for every such offence be subject to a penalty of five hundred pounds, to be recovered by action in one of Her Majesty's superior Courts at Westminster; and if any member of

the House of Commons votes as such in the said house, or sits during any debate after the speaker has been chosen, without having made and subscribed the oath hereby appointed, he shall be subject to a like penalty for every such offence, and in addition to such penalty his seat shall be vacated in the same manner as if he were dead.

31 & 32 Vict. c. 72, s. 2. The oath in this Act, referred to as the oath of allegiance, shall be in the form following, that is to say—

"I, —, do swear that I will be faithful, and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law. So help me God."

S. 8. The form of the oath of allegiance provided by this Act shall be deemed to be substituted in the case of the Parliamentary Oaths Act, 1866, for the form of the oath thereby prescribed, to be taken and subscribed by members of Parliament on taking their seats. . . .

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he been proved to be a person who can take the oath in the sense in which the English law attaches to the word "oath." This is a most important question. Of course it is very important to Mr. Bradlaugh, and deals with civil rights, which are to him, as they ought to be, most precious. No one can live in the year 1884, without feeling that it is a question that does not stop with Mr. Bradlaugh, but that it is a question of general and grave importance.

Now, then, what is an "oath" within the meaning of the English law? It is certainly something different from—I say not whether higher than—but different from an affirmation or a promise, however deliberate or solemn. The conscientious scruples entertained by one class of Christians, namely, Quakers, long ago, as far back, I think, as the reign of George I., if not earlier, were yielded to: and the very fact that an alteration in the law, and an Act of Parliament was required, to enable persons to affirm instead of to swear—the very fact that that required an Act of Parliament, and that the alteration was treated as a concession to conscientious scruples, shows that according to the law of England affirming may be equivalent to taking an oath, when made so by Act of Parliament; but that at least it is something different from an oath, which it required an Act of Parliament to substitute it for.

It is plain that the fact of the Quakers being allowed by Act of Parliament to affirm, shows that, in the English law, affirmation and oath differ, and that an oath was not merely a solemn form of affirmation, but something different. No man that I know of (I do not say only Christians) objects to make a solemn affirmation; no one objects to affirm, and as to Quakers, anyone who knows anything about them would know that they were earnestly contending for the right and duty of affirming in courts of justice in questions between neighbour and neighbour; they strongly urged that they had a right to, and were anxious to affirm in a solemn and religious way. At first (it was altered afterwards) before a Quaker could affirm, he had to sign by Act of Parliament a declaration that he believed in some of the most solemn articles of the Christian faith. There was no objection, therefore, upon the part of any of these persons, nor ever has been upon the part of anyone to solemn affirmation, whereas we know

many persons, not merely Quakers, but strong Christians, entertain objections, and do object to swear at all. Possibly some of the foundations of their objection may be the words of Scripture, but a great deal more of it was conscientious objection to the form—to swearing—the use of an oath at all, which they think, rightly or wrongly, is a thing not to be justified. This shows that if these bodies of men, Quakers to begin with, and numbers of other Christians, had thought that an oath was merely a more solemn mode of affirmation, they would not have objected to it, but it was because there was some difference between affirmation and oath, and because of the words, “I swear,” and because of the words, “So help me God.” Although I agree with Mr. Bradlaugh, that these words are not a portion of the oath, yet if the words, “I swear” were not different to the words, “I affirm,” strong Christians would have been contending for nothing at all but mere words. But, of course, they did not think so, and the Act of Parliament does not think so, and I am bound to say, as far as I understand it, the law does not say so. Swearing, I find laid down in Dr. Johnson, thus:—“To swear is to obtest some superior being, not necessarily the Supreme Being, because you may swear by something less than the Supreme Being.” Anyone at all familiar with either Philippe de Comines, or Sir Walter Scott, will know that they speak of a religious but not very good king, Louis XI., who did not mind what he swore by, so long as he did not swear by the cross of St. Lo, because if he did, he thought something terrible would happen to him if he broke it—he did not very much care about obtesting the Supreme Being. Then we really need not go beyond Shakespeare; there we have another king, not a very good king, but very fond of swearing by the Apostle Paul. That shows the correctness, therefore, of Johnson’s definition that it was to obtest some superior being—some being which you think is superior to yourself. Johnson also says, “An oath is a form, promise, or negation corroborated by the attesting of the Divine Being.” There he puts in the Divine Being; and I find in a book, that I have always regarded as a great authority, “Paley’s Moral and Political Philosophy,” these words are used as to an oath, “Whatever be the form of the oath, the signification is the same; it is the calling upon God

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to witness, that is, to take notice what we say, and it is invoking his vengeance, or renouncing his favour, if what we say be false or what we promise be not performed." Therefore I tell you that the words "I swear" in an English Act of Parliament, and they are so contained here, mean that I invoke the protection or the vengeance of the Supreme Being, according as I perform or break the promise with which such appeal to Him is now made. I really do not know whether that is an adequate or satisfactory account, but at all events it is the best I can give you, and I believe you will find that for the purposes of to-day it is sufficient. That is what I tell you the words "I swear" mean in a British Act of Parliament.

Now the matter does not stand simply upon my authority, because the same law has been laid down with much greater authority than mine, by Lord Tenterden, in *The Queen's Case* (2 Brod. & Bing. 284), as follows—it is true what I am reading to you, and which is the only important portion of the judgment at this particular point, is laid down by Lord Tenterden in his own person—but he lays it down, saying, that although he cannot pledge the other judges, he believes their sentiments to concur with his own; he says: "I conceive that if a witness says he considers an oath binding on his conscience, he does in effect affirm that in taking that oath he has called his God to witness." You are aware that a Mahomedan or a Hindoo, or any other person may be sworn in any of our courts, not according to our form, but according to a form binding upon them; and, therefore, Lord Tenterden says, with great accuracy, "his God;" in taking that oath he has called "his" God to witness what he shall say will be the truth, and that he is invoking Divine vengeance upon his head if afterwards it should be found that what he has stated should be false. It is also laid down by Lord Hardwicke and Lord Chief Justice Willes, in the case of *Omichund v. Barker*, as follows:—"De juris juramenti obligatione juris juramentum est affirmatio religiosa"—all that is necessary to an oath is an appeal to the Supreme Being as thinking Him the rewarder of truth, and avenger of falsehoods. That is not contradicted by any writer except Lord Coke, who puts in the word "Christians." Then he shows why Lord Coke is mistaken.

There is also a very striking passage in the judgment referred to by the Attorney-General, in a case of *Johnson v. Gridley*, reported in 17 Johnson's Reports of the Supreme Court of New York, decided in 1820: "Religion is a subject on which every man has a right to think according to the dictates of his understanding. It is a solemn one between his conscience and his God, with which no human tribunal has a right to meddle. But in the development of facts, and the ascertainment of truth, human tribunals have a right to interfere. They are bound to see that no man's rights are impaired or taken away but through the medium of testimony entitled to belief, and no testimony is entitled to credit unless delivered under the solemnity of an oath which goes home to the conscience of the witness, and will create a tie arising from his belief that false swearing would expose him to punishment in the life to come. On this great principle rest all our institutions, and especially the distribution of justice between man and man." If what I have said required sustentation by authority, then those authorities appear to me to be abundantly sufficient to sustain it.

Now I cannot help observing that, apart from the ingenious arguments which have been used in this case, this is what every man of sense and education would understand by the words "I swear;" he would understand something very different from "affirm," and would understand that he did, as I have said before, appeal to a Supreme Being. In this sense, which you must take as the sense in which "I swear" is used in an English Act of Parliament, could Mr. Bradlaugh swear? That depends upon the answer that you will give to a further question, which I shall now put to you, and I would remind you in the end again, in this as in all the rest of the case, the onus is upon the Crown. They have to prove the affirmative propositions I am about to present to you. "Have the Crown satisfied you that upon the 11th of February, 1884, the defendant had any belief in a Supreme Being? Have the Crown satisfied you that the defendant, upon the 11th of February, 1884, was a person upon whose conscience an oath as an oath had no binding force?"

Those are the words of the 5th count in this information, and I have followed them on purpose, because they raise in the language of the Crown the very points which the Crown

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wishes to have determined, and those are the points upon which it is the duty and business of the Crown to satisfy you in the affirmative, (that is to say, in form it is a negative, but in substance an affirmative;) that upon the 11th of February, 1884, the defendant had no belief in a Supreme Being, and that upon that day he was a person upon whose conscience an oath had no binding effect.

There is a further question which the 5th count in the information raises, and which it is necessary, supposing you answer those questions in favour of the Crown, to put to you, though if you answer them against the Crown it will not be material. Supposing you answer the former questions in favour of the Crown, then this third question becomes material, and it is: "Had the House of Commons full cognizance and notice of the said matters" (that is, that he did not believe in a Supreme Being, and that an oath, as an oath, had no binding effect upon his conscience) "by reason of the avowal of the defendant." It is for you to say in one event, supposing you find for the Crown on the two prior questions, whether that third point is also made out.

Now the proof tendered to you upon the part of the Crown is various. First of all they tender in evidence this, which is admitted on both sides to be a correct copy of the journals of the House of Commons, and it is admitted that the journals of the House of Commons is a correct narrative of what took place as stated there. It seems that upon the 3rd of May, 1880, the journals record as follows: "Mr. Bradlaugh, returned as one of the members for the borough of Northampton, came to the table, and delivered the following statement in writing to the clerk. 'To the Right Honourable the Speaker of the House of Commons, I, the undersigned Charles Bradlaugh, beg respectfully to claim to be allowed to affirm as a person for the time being by law permitted to make a solemn affirmation, or declaration, instead of taking an oath.—Charles Bradlaugh.' And being asked by the clerk upon what grounds he claimed to make an affirmation, he answered, by virtue of the Evidence Amendment Acts, 1869 and 1870. Whereupon the clerk reported to Mr. Speaker," and so on.

That is the first thing the Crown tendered. They say

Mr. Bradlaugh, when the present Parliament was elected, and when he first tendered himself to go through the necessary forms to enable him to take his seat, claimed to make an affirmation by virtue of the Evidence Amendment Acts, 1869 and 1870. What are those Acts? For the present purpose the Act of 1870 is not material, but the Act of 1869 is. The history of the Act is not very material, but, as a matter of fact, I believe it was passed in aid of those who wanted Mr. Bradlaugh's own testimony, which had been excluded in a particular case. Whatever the object and history of the Act be, it is not for us, we have only to do with its enactments and its words, and the words that are material are the words of the 4th section: "If any person, called to give evidence in a court of justice, whether in a civil or criminal proceeding, shall object to take an oath, or shall be objected to as incompetent to take an oath, such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect upon his conscience, make the following promise and declaration: "I promise," and so on. And any person who gives false evidence after that would be liable to the same fines and penalties, as if he had sworn.

That is the first proof on the part of the Crown. They say that Mr. Bradlaugh claims to be relieved from taking the oath, because he is a person who, if he had been called to give evidence in a court of justice, and had objected to take the oath, or if he had been objected to as incompetent to take the oath, would have been able to satisfy the presiding judge that an oath would have no binding effect upon his conscience. I may tell you an objection to a person as not believing in a God was in the old times an objection to the competency of a witness, and an objection which might be taken by anybody who wished to prevent the evidence of a particular man being taken—the words are: "such person shall, if the presiding judge is satisfied that the taking of an oath would have no binding effect upon his conscience, affirm;" therefore the Crown say, Mr. Bradlaugh himself stated that he was a person who, if he had been in a court of justice, would have been allowed to affirm, and he could presumably have satisfied the judge that the taking of an oath would have no binding effect upon his conscience. Of course if an oath were taken, and would have no binding effect upon his conscience, it would

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have no effect as an oath; it might have an effect as an affirmation, or it might have an effect as a statement, but an oath, which as I have explained means an appeal to the Supreme Being, would have no effect upon his conscience, and that the Crown say Mr. Bradlaugh has affirmed himself. No one objected to him, but he himself came forward, and claimed in the House of Commons to affirm, because he said: "If I were in a court of justice, I should have the right to affirm upon the ground that an oath would have no effect, and does not bind me as an oath at all." Then it is material to see what the Act of Parliament says upon the subject, because this is an Act dealing with persons called to give evidence in a court of justice. It is the Act of 1866 which is the Parliamentary Oaths Act. "Every person of the persuasion of the people called Quakers, and every other person for the time being by law permitted to make a solemn affirmation or declaration instead of taking an oath, may instead of taking and subscribing the oath hereby appointed, make and subscribe a solemn affirmation." Then, says Mr. Bradlaugh, "Putting the two things together, I had a right to affirm. I was a person, not a Quaker, but another person, who for the time being, by law, is permitted to make a solemn declaration instead of taking an oath, and, therefore, I claim the right to affirm." It has been decided by authority that binds us here that that is not the law, and that, within the meaning of this Act of Parliament, Mr. Bradlaugh was "not another person who for the time being by law was permitted to make a solemn affirmation," and therefore what he did, although it may have been done perfectly *bonâ fide*, and done upon very good advice, was not a legal thing. Whether that is well or ill decided it is not for me to suggest. It is decided, and decided by authority superior to the Court sitting here. But what the Crown say is, that however hard that may seem upon Mr. Bradlaugh, we cannot go into any question of hardship. We are here upon the dry question of fact, Could he take the oath within the meaning of the English law? and the first proof that we tender to you that he could not take the oath within the meaning of the English law is that he himself claimed to affirm (it seems wrongly) as being a person who, if he had been a witness in a court of justice could have satisfied

the presiding judge that the oath would have no binding effect on his conscience. They say, whatever may be the decision about affirmation it is plain that the ground of his claim was that the oath would have no binding effect upon his conscience, but it is the strongest evidence, say the Crown, that Mr. Bradlaugh can give us, namely his own, that he did claim to affirm upon the ground that he stated an oath would not bind him. That is the first ground the Crown put forward.

Then the defendant's statements to the committee are put forward as very strong evidence against him. If either party in this case think that I do not read what is important I ask to be interrupted and to be corrected, because in the first place it is no very great interruption to me—I do not mind it—and in the next place it is much better and of much great importance that justice should be done than that a judge should not be interrupted. I again say if either side desire anything to be read beyond what I read I trust they will say so, and I shall be only too happy to read it. Now, gentlemen, the committee was a committee appointed in June, 1880, "To enquire into and consider the facts and circumstances under which Mr. Bradlaugh claims to have the oath prescribed by the 29 & 30 Vict. c. 19, and 31 & 32 Vict. c. 62, administered to him in this House, and also as to the law applicable to such claim under such circumstances; and as to the right and jurisdiction of this House to refuse to allow the said form of the oath to be administered to him, and to report thereon." It is very true the report is not evidence, and, therefore, I will not read it, but I merely read the heading to show you under what views, and under what circumstances the answers I am about to read to you were made. It was a very large committee, and a committee apparently, as far as I can judge, consisting of members of both sides of the House. There are names upon it which we know very well belonging to both the great political parties, and I presume, like every tribunal of this kind that I ever heard of in the House of Commons, would, in the obvious wisdom of the case, be appointed impartially. Mr. Walpole was in the chair. I do not know whether Mr. Bradlaugh tendered himself or not, but he was examined, and it is upon the examination by different members of the committee as to this oath—as to this question,

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whether he had a right to be sworn—whether under all the circumstances he could take the oath or could not, that he made the answers I desire to read to you.

Mr. Bradlaugh says :—" I have never at any time refused to take the oath of allegiance provided by statute to be taken by members; that all I did was, believing, as I then did, that I had the right to affirm, to claim to affirm, and I was then absolutely silent as to the oath; that I did not refuse to take it, nor have I then or since expressed any mental reservation, or stated that the appointed oath of allegiance would not be binding upon me; that, on the contrary I say, and have said, that the essential part of the oath is in the fullest and most complete degree binding upon my honour and conscience, and that the repeating of words of asseveration does not in the slightest degree weaken the binding effect of the oath of allegiance upon me." I understand him to mean—though it is for you to say, that the repeating of the words of asseveration by which he means having used the words, " I swear that I will be faithful," and so on—is not in the slightest degree weakened by saying " So help me God," and that it remains as binding upon his honour and conscience as if those words had not been added. (Q.) " Pray do not answer this question unless you like; am I to understand you that the binding effect upon your conscience of the oath depends upon whether there is an alternative method of taking that which is to you equivalent to the oath?—(A.) No, most certainly not. Any form that I went through, any oath that I took, I should regard as binding upon my conscience in the fullest degree. I would go through no form, I would take no oath, unless I meant it to be so binding. (Q.) Pray object if you do not wish to answer this question. By virtue of what do you regard that assertion which you make within the oath as binding?—(A.) I have not caught your question, if you will pardon me for saying so. (Q.) By virtue of what portion of what is contained in the oath do you feel that your conscience is bound; is it by the mere fact that you repeat the words therein contained, or is it by that which is contained in the form of the oath?—(A.) Those words, ' I do swear that I will be faithful and bear true allegiance to Her Majesty Queen Victoria, her heirs and successors, according to law,' are to me binding in the most full and complete, and thorough degree on my conscience. (Q.)

If you read a promise out of any book or paper and said, 'I promise so to do,' is there more binding effect in those words that you have read than in the mere ordinary assertion of a promise?—(A.) Yes, because this reading is by law, and by the decision of your committee intended to be the form in which I pledge my allegiance as a member. (Q.) Then if it were a form sanctioned by law, as in the case of an affirmation, is there any more effect upon your mind if you take it in the form of what we call an oath than if you took it simply by words of affirmation or promise?—(A.) If the form sanctioned by law ran, 'I affirm,' or 'I declare and affirm,' or 'I solemnly and sincerely declare and affirm' (I leave out the rest of the words because they are immaterial), "that would be equally binding upon my conscience. (Q.) Do you attach any express or particular meaning to the words, 'I swear?'—(A.) The meaning that I attach to them is that they are a pledge upon my conscience to the truth of the declaration which I am making. (Q.) But a pledge given, may I ask to whom?—(A.) A pledge given to the properly constituted authorities, whosoever they may be, who are entitled to receive it from me." It will be for you to say whether in any reasonable form of words, "The Supreme Being" could come under the words, "properly constituted authorities." Then he is asked, "Do you attribute any more meaning to those words than a pledge to human beings around you?—(A.) I attach no more meaning to those words than I do to a pledge to human beings authorised by law to take such a pledge from me under similar solemn circumstances." Then he is asked again, a little further on, "Do you attribute any greater weight or any meaning to the words, 'I swear,' and to the fact of kissing the book beyond the words of ordinary promise?—(A.) Not beyond the words of ordinary promise made under statutory obligation. (Q.) Then what greater weight do you attach to a promise made under statutory obligation than to an ordinary promise?—(A.) I would prefer not making any promise that I did not intend to keep, but the law has attached a weight to statutory promises, and a penalty and disgrace on the breaking of them. (Q.) That is a consequence resulting from human action; you do not attribute any other weight to such a promise beyond what results from such penalties?" Now, what is the answer: "I

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object to answer that question." So that that question remains unanswered. Then he says further on he objects to being asked what he has stated in other places, and he says, in a manly way enough, "I must admit that happened seven years ago; I do not intend to imply that there is any change or anything since, but I think I am entitled to say to this committee that it is hardly within the limits of their reference to inquire into something that happened in a law court between myself and a judge seven years ago." Then, he is asked, later on, "Do you consider that if you use the word 'swear' you appeal to God?—(A.) I consider that I take an oath which is binding upon my honour and my conscience. (Q.) Without any reference to God?—(A.) I consider that I take an oath which is binding upon my honour and conscience. (Q.) And supposing that you break that oath, what would be the consequences which you consider would result to you?—(A.) I am not aware that the statute has provided that I shall declare my opinion upon those consequences." Then, again, he is asked—"I wish to ask you one question with reference to what took place before Lord Justice Brett (then Mr. Justice Brett), and, of course, if you think proper you will take the objection as you did to what the Attorney-General asked you. When Mr. Justice Brett admitted you to affirm, what steps did he take with a view to satisfy himself that an oath would not be binding upon your conscience?—(A.) He put to me the question 'Why?' and I gave to him three words as an answer, and these three words apparently satisfied him, and he directed the clerk to allow me to affirm. He put no question to me as to whether the oath was binding upon me or not. (Q.) Have you any objection to tell the committee what those three words were?—(A.) The question put by Mr. Justice Brett was, 'Why?' I object to tell the answer, because it would be an inquiry into a man's religious opinions, and Sir George Grey, in introducing the Parliamentary Oaths Act in 1866, under which I claim, said, 'We will make no inquiry into any man's religious opinions; let the constituencies be the judges of that.' Then he is asked, 'Do you propose to take the oath in the form given in the statute of 1868, which I will read to you?' Then Mr. Watkin Williams reads the whole oath to him, ending with the words 'So help me God!' And the answer is, 'I do,' that being the form in the

statute. (Q.) If you are permitted to take that oath, do you intend the committee to understand and believe that it will be binding upon your conscience as an oath?—(A.) Yes.” That is an answer to which Mr. Bradlaugh has more than once appealed, but he forgets that that is followed by this question and answer. (Q.) “In taking such oath do you consider yourself as appealing to some Supreme Being as a witness that you are speaking the truth?—(A.) I submit that, having said that I regard the oath as binding upon my conscience, this committee has neither the right nor the duty to further interrogate my conscience.” Now, then, again he is asked later on, (Q.) “Then do you attach any further importance to the word ‘swear’ in the oath itself, and to the fact of the kissing of the book, than if the word ‘swear’ were written ‘affirm,’ and no kissing of the book were required?—(A.) I have already said that I attach to the complete affirmation the most complete binding effect on my conscience. If I were allowed a preference I would, and still do, prefer the affirmation. The law says that the oath is the form, and I shall regard that form as in all its respects binding upon my conscience. (Q.) Do you look upon the kissing of that particular book as adding any more sanction than the kissing of any other book?—(A.) I decline to do that which the law has not done: the law has not split up the formula into parts, and expressed an opinion upon each part separately, and I deny the right of the committee to ask me to do that which the law has not done.” He is further asked: “Do you think that the fact of the kissing of that book has any relation to an appeal to a Supreme Being, that you will, before Him, perform the oath which you have taken?—(A.) The law has not required me, in any case, to express an opinion as to that by itself. As to the whole oath I have expressed an opinion.”—(Q.) “But still you consider that a certain part of that oath, which the statute imposes upon you the necessity to take, is an idle, and empty, and meaningless form?—(A.) I have never said so at any time.—(Q.) But do you consider it so?—Most certainly I do not consider the most considerable portion of it an idle and empty form.—(Q.) Some portion of it, I said?—(A.) I consider no portion of the essential oath an idle and empty form.”

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Those are the answers, and you will remember what was the state of the case. Mr. Bradlaugh claimed to take the oath as a member of the House, but was not permitted to take the oath upon the ground that it would have no binding effect upon his conscience, because he did not believe in a Supreme Being. The committee was appointed by the House to inquire into whether he could take the oath, and whether the House had any right to prevent him. Clearly, if he believed in a Supreme Being, and the taking of an oath was binding upon his conscience, and he satisfied the committee of that, or if he had gone anywhere near to satisfying the committee of that, it is to be presumed that the committee would have been so satisfied, and would have so reported. But that is not material, because it may be (I do not say it was so for a single instant) that it was a partisan committee, and acted in a partisan way, but we have nothing to do with the determination of the committee. I am calling your attention to the circumstances under which these questions were put to Mr. Bradlaugh, and the answers which Mr. Bradlaugh thought it right to give. He knew what was the inquiry; he knew to what point the inquiry was directed; he knew what sort of answers would either provoke hostility or assuage hostility, and put an end to the inquiry in his favour. It is plain that to a great many of the crucial questions put to him, Mr. Bradlaugh declined to give an answer, and there are two views to be taken of that. Upon the one hand it is said that Mr. Bradlaugh, the moment he came to the crucial point, "Do you believe in a God?" "Has the form of the oath, apart from the affirmation contained in the form, any binding effect upon you more than an asseveration without the form of the oath?" declined to answer the questions; and it is to be observed that he says in answer to that, that they have no right to ask him the question. He says, "I am ready to take the oath as it stands; I am ready to take the oath as binding upon my conscience as it stands. I decline to tell you whether it is binding, because it contains the words 'I swear.' I decline to say whether, in refusing to take the oath, or in taking the oath, I consider I am appealing to a Supreme Being of any kind. I will not tell you, because you have no right to ask." Now it is said hostilely to that, that he was ready enough to

answer all questions which he thought would favour him, but the moment he came to the really important and crucial test: "Do you believe in a God?" "Do you use the words 'I swear,' in the sense in which an ordinary Christian" (I do not say a Mahomedan, Hindoo, Buddhist, or any of the ordinary forms into which the religions of mankind are split), "do you use them in the sense in which such people use them?" he says, "You have no right to put it to me." It is said upon the part of the Crown that that is an evasion, and if a man evades it would be giving evidence against himself. It is honourable in him in one sense, because he would not, under any consideration, say what he did not think—he would not say he believed in a God when he did not—he would not say that an oath, as an oath, had any more binding effect than any other solemn affirmation. No doubt it would have been extremely convenient to him if he could have said so, but he was an honourable man, and would not say so, because he could not, and therefore that is the strongest evidence, say the Crown, out of his own mouth, that he did not believe in a Supreme Being, and that an oath in the sense in which I have explained was not binding upon his conscience. Upon the other side it is said that you have no right to make these inquiries, and that a man if you come with an inquisitorial tone, and in the spirit of an old middle age inquisitor, and ask him, "What do you believe in, this or that?" has a right to object to answer the question. Mr. Bradlaugh did not do what I have suggested to you he might fairly have done. He might have said: "The whole of this inquiry is offensive. I decline to answer the question as to my belief or not. I am ready to take the oath, and I will not answer any question. You have no right to put the questions to me as to my belief—here I stand ready to swear in the words of the Act of Parliament, and I decline to say a word more." I do not say that everybody, but some people would have great respect for that line of defence—it might be taken, I do not say it would have been, by the most sincere believer in the world. It might be said by a sincere believer: "I object to this altogether; I will not tell you; I am ready to take the oath, and I decline to answer more." But then, gentlemen, that is not what Mr. Bradlaugh does. Mr. Bradlaugh comes before the com-

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mittee, and nine questions out of ten Mr. Bradlaugh does answer. He answers the questions so far as they are in his favour, and he does not take his stand as to the incompetency, or, at any rate, the impropriety of the whole inquiry. He says: "I will go into the inquiry so far as it is advantageous to myself," but when it comes to the particular sort of question which, like an honourable man, he cannot answer, then, and not till then, does he say that he refuses to answer. Therefore you must take the whole of these matters together, and you must say on this part of the case what is the fair inference upon candid minds of such a set of answers as I have read to you. You must take the whole state of the case into account, and recollect, however much you might object, and other people might object to this being done in an ordinary case, that Mr. Bradlaugh tendered himself, and did without objection, indeed after warning, answer most of the questions that the Attorney-General and other members of the committee put to him. Therefore it is for you to say what is the fair effect of the evidence I have read to you, taken, as all evidence must be taken, with a recollection of the circumstances of the case under which it was given, and the advantage or disadvantage of the answers that were given to the questions.

Now then, gentlemen, there is a further piece of evidence which it is said is very material, namely, the statement which was handed in by Mr. Bradlaugh to the committee as a statement of his case, or at all events a statement in relation to his case. Mr. Bradlaugh has referred to it himself. It is a paper in many respects creditable to him both for what it does say, and for what it does not say. I have it before me, and it is admitted to be correctly set out, and it will be for you to say what is the fair effect on candid minds of this paper. It is dated the 20th May, 1880, and Mr. Bradlaugh says, "When elected as one of the burgesses to represent Northampton in the House of Commons, I believed that I had the legal right to make affirmation of allegiance in lieu of taking the oath, as provided by sect. 4 of the Parliamentary Oaths Act, 1866. While I considered that I had this legal right, it was then clearly my moral duty to make the affirmation. The oath, although to me including words of idle and meaningless character, was, and is regarded by

a large number of my fellow countrymen as an appeal to Deity to take cognisance of their swearing. It would have been an act of hypocrisy to voluntarily take this form if any other had been open to me, or to take it without protest, as though it meant in my mouth any such appeal." Now words must mean what they say, and as I say in one point of view it is very honourable to Mr. Bradlaugh, if the appeal to the Deity had no meaning in his mouth, to say that it had not. The question for you is whether he did say so; he says, "The oath, although to me including words of idle and meaningless character, was, and is, regarded by a large number of my fellow countrymen as an appeal to Deity to take cognisance of their swearing. It would have been an act of hypocrisy to voluntarily take this form if any other had been open to me, or to take it without protest, as though it meant in my mouth any such appeal." You must judge for yourselves, and exercise your own good sense upon it, and say what opinion upon this question you arrive at? Then Mr. Bradlaugh goes on to say, "I therefore quietly and privately notified the clerk of the House of my desire to affirm. His view of the law and practice differing from my own, and no similar case having theretofore arisen, it became necessary that I should tender myself to affirm in a more formal manner, and this I did at a season deemed convenient by those in charge of the business of the House. In tendering my affirmation I was careful, when called on by the Speaker to state my objection, to do nothing more than put in the fewest possible words my contention that the Parliamentary Oaths Act, 1866, gave the right to affirm in Parliament to every person for the time being by law permitted to make an affirmation in lieu of taking an oath, and that I was such a person, and therefore claimed to affirm. The Speaker, neither refusing nor accepting my affirmation, referred the matter to the House, which appointed a select committee to report whether persons entitled to affirm under the Evidence Amendment Acts, 1869 and 1870, were, under sect. 4 of the Parliamentary Oaths Act, 1866, also entitled to affirm as members of parliament. This committee, by the casting vote of its chairman, has decided that I am not entitled to affirm. Two courses are open to me, one of appeal to the House against the decision of the committee; the other of

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present compliance with the ceremony, while doing my best to prevent the further maintenance of a form which many other members of the House think as objectionable as I do, but which habit and the fear of exciting prejudice has induced them to submit to. To appeal to the House against the decision of the committee would be ungracious, and would certainly involve great delay of public business. I was present at the deliberations of the committee, and while naturally I cannot be expected to bow submissively to the statements and arguments of my opponents, I am bound to say that they were calmly and fairly urged. I think them unreasonable; but the fact that they included a legal argument from an earnest Liberal deprives them even of a purely party character. If I appealed to the House against the committee, I, of course, might rely on the fact that the Attorney-General, the Solicitor-General, Sir Henry Jackson, Q.C., Mr. Watkin Williams, Q.C., and Mr. Serjeant Simon are reported in the "Times" to have interpreted the law as I do; and I might add that the Right Honourable John Bright and Mr. Whitbread are, in the same journal, arrayed in favour of allowing me to affirm. But even then the decision of the House may endorse that of the committee, and should it be in my favour it could only, judging from what has already taken place, be after a bitter party debate, in which the Government specially and the Liberals generally would be sought to be burdened with my anti-theological views, and with promoting my return to Parliament." Something has been said about anti-theological views—no doubt in the strict sense the word "anti-theological" means against any theology. There is the word, and you must judge of the state of the mind of the person using it. "As a matter of fact, the Liberals of England have never in any way promoted my return to Parliament. The much attacked action of Mr. Adam had relation only to the second seat, and in no way related to the one for which I was fighting. In 1868, the only action of Mr. Gladstone and of Mr. Bright was to write letters in favour of my competitors; and since 1868 I do not believe that either of these gentlemen has directly or indirectly interfered in any way in connection with my parliamentary candidature. The majority of the electors of Northampton had determined to return me before the recent union

in that borough, and while pleased to aid their fellow Liberals in winning the two seats, my constituents would have at any rate returned me had no union taken place. My duty to my constituents is to fulfil the mandate they had given me, and if to do this I have to submit to a form less solemn to me than the affirmation I would have reverently made—"Why is it less solemn, you will ask yourselves, unless it is that it is not an appeal to a divine being—"so much the worse for those who force me to repeat words which I have scores of times declared are to me sounds conveying no clear and definite meaning. I am sorry for the earnest believers who see words sacred to them used as a meaningless addendum to a promise, but I cannot permit their less sincere co-religionists to use an idle form in order to prevent me from doing my duty to those who have chosen me to speak for them in Parliament. I shall, taking the oath, regard myself as bound, not by the letter of its words, but by the spirit which the affirmation would have conveyed had I been permitted to use it. So soon as I am able I shall take such steps as may be consistent with Parliamentary business to put an end to the present doubtful and unfortunate state of the law and practice, on oaths and affirmations. Only four cases have arisen of refusal to take the oath except of course those cases purely political in their character. Two of those cases are those of the Quakers, John Archdale and Joseph Pease. The religion of these men forbade them to swear at all, and they nobly refused. The sect to which they belonged was outlawed, insulted and imprisoned: they were firm, and one of that sect sat on the very committee, a member of Her Majesty's Privy Council, and a member of the actual Cabinet. I thank him gratefully that, valuing right so highly, he cast his vote so nobly for one for whom I am afraid he has but scant sympathy. No such religious scruple prevents me from taking the oath as prevented John Archdale and Joseph Pease." John Archdale and Joseph Pease were known to be Quakers who truly and conscientiously objected to take the form of oath, not that they disbelieved in a Supreme Being, but that they had a religious objection altogether to the form of oath. "In the cases of Baron Rothschild and Alderman Salomons, the words 'upon the true faith of a Christian,' were the obstacles. To-day the oath contains no such words.

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The committee report that I may not affirm, and protesting against a decision which seems to me alike against the letter of the law and the spirit of modern legislation, I comply with the forms of the House."

Gentlemen, that is the paper that Mr. Bradlaugh handed in to the committee, and which is tendered to you as a piece of cogent proof that Mr. Bradlaugh's opinions are what the Crown is bound to make them out to be.

Now, there is one matter which has to be observed upon, and this, I am happy to say, is the only matter upon which there has been any difference of opinion between my learned brothers and myself, and that is a matter which, as there are three of us, two must be one way, and one the other—I refer to this, whether I should leave to you, and you are entitled to take into account, the fact that Mr. Bradlaugh being clearly a competent and possible witness in the case, having called witnesses himself, has not chosen to place himself in the witness box to show that he is not liable to these penalties. That is variously put from the bench. Upon the one side I believe my brother Huddleston, and I think that this case must be judged like all other cases. It is a matter of common observation that from the time of Lord Mansfield it has been said that if a man can prove—and by that expression, I mean has it in his power to prove—a particular thing, and ought to prove that particular thing, and does not prove it, the argument against him is that he cannot prove it. It is said, or suggested, why does not Mr. Bradlaugh put an end to this strife by getting into the witness box and saying, I do believe in a Supreme Being in the sense of believing, that "I swear" means an appeal to a deity. He does not say so, because he is an honourable man, and cannot say that he does believe in a Supreme Being, and cannot say that an oath would be binding upon his conscience in the sense that an oath is used in the English language, and, be the consequences what they may to him, Mr. Bradlaugh will not say words which would be untrue in his mouth. That is one way of putting it, and that is the question for you, whether, having the opportunity of making the statement and declining to make it, the fair inference is not, that he cannot make it as an honourable man. From one point of view it is a very honourable thing that he should not do it, because by saying a few words he might put

an end to all this trouble, but he will not say those few words, and the question for you is, what is the effect of his so refusing? I will now state to you the view which my brother Grove takes of this matter: It is in substance this; it is for the prosecutors to make out their case; if they have not made it out, they have not made it out; none the less because the defendant has not come into the box, and is not bound to come into the box, to disprove what they have failed to prove. This is the language in which, upon this question my brother Grove desires his views should be expressed. "The burden of proof is upon the Crown"—and I may say in passing we are all agreed in that—"to satisfy the jury in the Crown's favour upon each of the questions submitted to them. If the case for the prosecution is not, in the judgment of the jury, answered by the case of the defendant, the jury should find for the Crown upon such question or questions as are proved to their satisfaction." So far I think we should all agree. Then my brother Grove goes on in this way, "If the jury are not satisfied as to the case of the Crown, the defendant not tendering himself as a witness does not alter the case for the Crown, and upon any question which the Crown has not proved to their satisfaction, the jury, unless the defendant's evidence has altered their opinion, should find for the defendant." Therefore, my brother Grove thinks that the question of Mr. Bradlaugh not presenting himself in the witness box ought not to be left to you at all. It is not a thing that you have any right to take into account if the burden upon the part of the Crown is not fulfilled by proving its case. If it is fulfilled by proving its case, *cadit quæstio*, and there may be something for Mr. Bradlaugh to answer, but if it is not fulfilled, and it has not fulfilled its duty by proving its case, probably the absence of Mr. Bradlaugh from the witness box would not be a matter which you would be entitled to consider. I regret that upon this one, so apparently small a matter—I do not say small in its importance generally, but small in this particular case, because the evidence is so very abundant upon both sides—there should have been a difference of opinion, but I rejoice that it should be the only question upon which there exists any difference of opinion between my learned brothers and myself.

Now, gentlemen, that is nearly all I have to say to you,

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because the only remaining question which might have become important in one respect, is as to whether the defendant was prevented in point of fact from taking the oath by the action of the House of Commons. Unless I have some intimation that that question is desired to be left to you, I should say that it is clearly proved beyond all question that, as a matter of fact, the House of Commons prevented the taking of the oath according to the course and practice of Parliament. The journals appear to me to show it; the evidence is overwhelming, as it appears to me, and as I hear no intimation, I shall assume that there is no question for you. I do not mean that it is to be removed from you, but that there is no evidence whatever that ought to be left to you except overwhelmingly conclusive evidence, *valeat quantum*, that the preventing of Mr. Bradlaugh as a matter of fact from taking the oath in the usual form, was by the action of the House of Commons. There are other important questions which may arise, but I indicate them only for the purpose of showing that we have not forgotten that they do arise. There is the question as to the legality of the resolution of the House of Commons, and whether legal or illegal this Court can examine into it. Then also there is the question whether a man can or not administer the oath to himself. These questions, Gentlemen, are important questions but they are not questions for you, because there is no evidence except one way; there stands the resolution uncontradicted and unquestioned, and no verdict of yours—nothing that you can say—can make it either legal or illegal. Then again that Mr. Bradlaugh did administer the oath to himself, that he took it and subscribed it in the sense that he kissed the New Testament, not leaving the book upon the table but producing one here which is admitted to be the same book—that he did subscribe the oath upon a piece of paper signed, “Charles Bradlaugh,” leaving it upon the table with the certificate of his return, is not disputed as a matter of fact. Whether that is or is not a compliance with the Act of Parliament, is a question which you cannot in my opinion, and in the opinion of all of us, by any judgment of yours, answer, because the facts are not disputed, and the question is whether those facts undisputed in point of law do or do not drive us to one conclusion.

Gentlemen, I have very little more to say, but there is this,

which I think is important, and I think it is the last thing I shall have to say to you ; I have pointed out to you that the words of the indictment or information necessarily fix a particular date, and the particular date fixed is the 11th of February, 1884, and you will not have failed to remark in the questions I am about to leave to you, I have put in each case the 11th of February, 1884. It has been said, and said with truth, that all this evidence which has been given in evidence, is at least two years old. There is nothing, and I shall be corrected if I am wrong, in the evidence in the case with reference to Mr. Bradlaugh's state of opinion later than 1882. An observation arises upon that ; the Attorney-General has said that a person's opinions must be taken to remain as they were until there is some proof to the contrary, and there is some authority for that. I do not know that it is very cogent and still less very English, I think chiefly American, but no doubt there is authority for it. In Taylor on Evidence (Edit. 6, vol. ii., p. 1201), it is said, " Whatever religious opinions he is proved to have once entertained, they are presumed to continue unchanged until the contrary is shown." The only authority for that is an American case of the *State v. Stinsen* (7 Law Reporter, 383). I am sure I desire to treat with every respect and gratitude the American lawyers, but we must not be understood here, though speaking of them with great deference and the greatest respect, to treat American decisions as authorities for the courts of England. It is obvious, there being twenty States, and some of them having judges elected annually, the weight of authority would be extremely different according to the different States, and therefore it must not be supposed that everything to be read from an American Court is to be taken as an authority for an English court. I have heard it said over and over again, and it would seem to me to be so, that to say that America was an authority for these Courts, would be to impose upon the Bar the obligation of taking in all the American law books. However, there it is, and it is obvious that if that case came from the highest authority it must be taken with very great qualification, and must be a question depending entirely upon circumstances. It is said, " A man's opinions once entertained are presumed to continue until the contrary is shown." A young man at school or college in the

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heat of argument maintains atheism, therefore is it to be supposed that the same man at the age of eighty, nothing being shown in the meanwhile, maintains the same opinions? Why, obviously, it is absurd. No doubt it may be said that is an extreme case. But, on the other hand, if a man maintains an opinion to-day, and goes into the witness box, or does not go into the witness box to-morrow to show that he has changed his opinions, the fact that he has expressed an opinion one way at one o'clock the day before, would be very cogent evidence to show that he entertained the same opinion upon the following day. In a certain sense it may be, when once you show the man's opinions are what they are, that that is some evidence that they remain the same at the time of the investigation, however distant. Admitting the principle for the purpose of argument, it is manifest it must be taken with very grave qualification, and must be entirely according to the circumstances. Here we have the fact, that Mr. Bradlaugh in 1882 made use of these expressions.

Gentlemen, I was wrong, and I correct myself—May and June, 1880, that is four years ago. Of course there is plenty of time, as I said in the course of the argument, for a man in four years to have changed his opinions, indeed, many men have changed their opinions in much less time on very many questions, but it must be a question of sense, and what you look at upon the whole of the evidence. You must not take it as proved conclusively no doubt, that because a man held a particular view in May and June, 1880, that therefore he held that particular view on the 11th of February, 1884. That is true, but on the other hand, that he held that opinion in June, 1880, is some evidence that he continued to hold it in February, 1884, although no doubt the weight of the evidence is for you. The weight of the evidence may vary in almost every degree between the two cases I put to you just now, one being a boy saying some foolish thing at school or college, and being supposed, when he gets to be an old man with one foot in the grave, to maintain the same opinions; the other being a man in full vigour and senses saying a thing upon one day and not contradicting it the next day, in which case the argument would be exceedingly strong that the same opinion was maintained. This, however, is something between the two, neither separated by any great

lapse of time, nor by only twenty-four hours. Here it is separated by four years, but I must say—I think it is due to say—separated by four years, during which these opinions have been made matter of comment, and made matter of hostile action against the defendant, and any notification by Mr. Bradlaugh of any real change of opinion during any period of this time would only have been too heartily welcomed by those who support him and by those who differ with him. You must take the whole thing together. The question is, whether the evidence is such as to satisfy you upon the questions which are left to you.

There is just one other question to consider, and that is, whether the House of Commons had full cognizance and notice of these matters by reason of the avowal of the defendant. Upon that the only thing which is necessary to say is this—that it need not in my view, or in the view of my learned colleagues, be necessary for the whole 658 members of the House of Commons, to have notice; but had the House, in the ordinary understanding of the words, had the House by its journals, had it by its majority of members, had it, acting as a House, cognizance and notice of these matters, which the Crown are bound to satisfy you of, and which unless the Crown satisfies you of, the question does not arise. Have the Crown satisfied you that upon the 11th of February, 1884, the defendant had no belief in a Supreme Being? Have the Crown satisfied you that upon the 11th of February, 1884, the defendant was a person upon whose conscience an oath had no binding force? If you find those against the Crown, the third question does not arise; but if you find for the Crown, then I must ask you whether the House of Commons had full cognizance and notice of these matters by reason of the avowal of the defendant.

The following were the questions left to the jury, and the answers returned by them:—

1. "Was the Speaker in fact standing in front of the chair or sitting in the chair at the time when the defendant made and subscribed the oath?" The answer is, "Sitting."

2. "If you think the Speaker was sitting in point of fact, then was he sitting for the purpose of preparing and correcting notes which he was about to use in addressing the defendant, or for any other purpose, and if for any other purpose, can

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you say for what purpose ? ” The jury answer, “ Sitting for the purpose of preparing or correcting notes which he was about to address to the defendant.”

3. “ Had the Speaker resumed his seat, and if he had, had he resumed it for the purpose of allowing the defendant to make and subscribe the oath ? ” The jury answer, “ No.”

4. “ Have the Crown satisfied you that upon the 11th February, 1884, the defendant had no belief in a Supreme Being ? ” The jury say, “ We unanimously agree that the defendant had upon the 11th February, 1884, no belief in a Supreme Being.”

5. “ Have the Crown satisfied you that the defendant upon the 11th February, 1884, was a person upon whose conscience an oath, as an oath, had no binding force ? ” Answer, “ Yes, we are satisfied.”

6. “ Had the House of Commons full cognizance and notice of the said matters by reason of the avowal of the defendant ? ” Answer, “ Yes.”

7. “ Did the defendant take and subscribe the oath in the sense explained according to the course and practice of Parliament ? ” The answer is, “ Not according to the full practice of Parliament.”

8. “ Did the defendant take and subscribe the oath.” Answer, “ Not as an oath.”

Upon these findings a verdict was entered for the Crown.

Solicitor to the Treasury.

Lewis & Lewis.

MATHEW, J.,

WEBSTER v. ARMSTRONG.

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January 19.

THIS was an action for damages for false and fraudulent representations on the sale of a public-house business by the defendant to the plaintiff.

After the plaintiff had issued his writ, but before it had been served on the defendant, the defendant commenced an action in the County Court against the plaintiff for 40*l.* for goods sold and delivered. As a defence by way of counterclaim to this County Court action the plaintiff set up his claim for damages for the misrepresentations before mentioned; and on the hearing the jury assessed the damages on the counterclaim at 250*l.* The County Court judge thereupon gave judgment for the plaintiff (*i.e.*, for the defendant in the County Court action).

In an action in the County Court for a liquidated demand, the defendant, by way of defence, counterclaimed for unliquidated damages. These were assessed at an amount exceeding the plaintiff's claim, and exceeding the amount up to which the County Court had jurisdiction. The judgment was given for the defendant simply. The defendant sued in the High Court to recover the amount by which the damages awarded to him in the County Court overtopped the plaintiff's claim.

Finlay, Q.C., and *M. Powell* for the plaintiff, contended that the effect of his setting up his claim to damages as a shield to the defendant's claim in the County Court action was not to deprive him of his right to recover in this action the amount by which his claim overtopped the defendant's claim in the County Court action. They cited *Davis v. Flagstaff Mining Company* (L. R. 3 C. P. D. 228), and referred particularly to the observations of *Thesiger, L.J.*, on the very point at p. 242: and the Judicature Act, 1873, ss. 89 and 90.* Again, as it was competent and indeed

Held, that he was not estopped from doing so; and that the defendant (in the High Court action), was estopped from disputing the assessment of damages made in the County Court.

* *Section 89.* Every inferior Court which now has or which may, after the passing of this Act, have jurisdiction in equity or at law and in equity and in Admiralty respectively, shall, as regards all causes of action within its jurisdiction for the time being have power to grant and shall grant in any proceedings before such Court, such relief, distress, or remedy, or combination of remedies, either absolute or conditional, and shall in every such proceeding give such

and the like effect to every ground of defence or counterclaim, equitable or legal (subject to the provision hereinafter contained) in as full and ample a manner as might and ought to be done in the like case by the High Court of Justice.

Section 90. Where in any proceeding before any such inferior Court, any defence or counterclaim of the defendant involves matter beyond the jurisdiction of the Court, such defence or counterclaim shall not affect the compe-

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necessary for the County Court to ascertain questions of liability and amount of damages on the counterclaim, the defendant is estopped in this action from disputing the decision on those points of a Court of competent jurisdiction. *Flitters v. Allfrey* (L. R. 10 C. P., p. 29).

A. C. Nicoll for the defendant.—The remarks of Thesiger, L. J., are merely *obiter dicta*. The plaintiff's claim has become *res judicata*. There is no hardship on the plaintiff, as he might, and should under the proviso in s. 90 of the Judicature Act, 1878, have had the whole proceedings transferred from the County Court to the High Court, and he must take the consequences of his neglect to do so. The inference to be drawn from s. 18 of the Judicature Act, 1884 (47 & 48 Vict. c. 61), is that this was the law till that enactment was made.*

tence or the duty of the Court to dispose of the whole matter in controversy so far as relates to the demand of the plaintiff and the defence thereto, but no relief exceeding that which the Court has jurisdiction to administer shall be given to the defendant upon any such counterclaim: Provided always that in such case it shall be lawful for the High Court or any Division or Judge thereof, if it shall be thought fit on the application of any party to the proceeding, to order that the whole proceeding be transferred from such inferior Court to the High Court or to any Division thereof; and in such case the record in such proceeding shall be transmitted by the Registrar or other proper officer of the inferior Court to the said High Court, and the same thenceforth be continued and prosecuted in the said High Court as if it had been originally commenced therein.

* *Section 18.* The jurisdiction of an inferior Court in cases of counterclaim under ss. 89 and 90 of the Supreme Court of Jurisdiction Act, 1873, shall not

be excluded by reason (1) that any such counterclaim involves matter not within the local jurisdiction of such inferior Court, but within the jurisdiction of any other inferior Court in England; or (2) that where the counterclaim involves more than one cause of action, as to each of which the defendant might have maintained a separate action, each such cause of action being within the jurisdiction of the Court the aggregate amount of the counterclaim exceeds the jurisdiction of the Court; or (3) that the counterclaim is for an amount of money exceeding the jurisdiction of the Court, provided that the plaintiff does not object in writing within such time as may be prescribed by any rules to the Court giving relief exceeding that which the Court would have had jurisdiction to administer prior to the commencement of this Act. In any case where the counterclaim involves matter beyond the jurisdiction of the Court, notwithstanding the provisions of this section, the Court may, on such terms (if any) as the Court may think just, either adjourn the hear-

MATHEW, J.—There must be judgment for the plaintiff. The intention of sections 89 and 90 is obviously to enable a defendant to avail himself of a cross-claim as a defence in an Inferior Court, although the Inferior Court had no original jurisdiction in the matter of the cross-claim. For that limited purpose therefore the Legislature gave the County Court jurisdiction, but nothing is said as to ulterior proceedings. Is the defendant in a County Court under such circumstances to be regarded as abandoning his claim except as a defence? It is monstrous that he should be only able to avail himself of such a defence, on the terms of giving up the surplus of what may be a liquidated demand. The proviso in section 90 is relied on by Mr. Nicoll: but it is observable that the transfer to the High Court there alluded to is not a matter of right, but only one to be exercised, if it shall be thought fit. The *dicta*, too, in *Davis v. Flagstaff Mining Company* are very strong against the defendant's contention. I therefore think that there is no estoppel by reason of the matter being *res judicata*.

On the second point, it is clear that the judgment of a competent Court is binding on all Courts.

C. G. Hobbes.

Senior, Attree & Johnson.

ing of the case or stay execution on the judgment for such time as may be necessary to enable any party to apply to remove the proceedings into the High Court of Justice or to enable the defendant to prosecute in a Court of competent jurisdiction an action for the purpose of establishing his counter-

claim; and in default of any such application being made or action brought, the Court shall, after the expiration of the time limited, have jurisdiction to hear and determine the whole matter in controversy to the same extent as if all parties had consented thereto.

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January 20.

LEVY & CO. v. THE MERCHANT MARINE
INSURANCE COMPANY.

In a policy of marine insurance against "absolute total loss only," "absolute total loss" means a total loss other than a constructive total loss. A ship was insured against absolute total loss only, and on the voyage insured she was rendered by perils of the seas a constructive total loss of such a character that no prudent uninsured owner would have done anything to her. The voyage was abandoned, and by the continuous operation of sea perils she became a total wreck. Held, that the loss was covered by the policy.

THIS was an action on a policy of insurance for 1,000*l.*, dated Nov. 19th, 1881, on the ship *Ardenlea* against "absolute total loss only," from Greenock to Cardiff. The policy was effected through and in the name of Messrs. Gladstone & Co., insurance brokers. The plaintiffs in October, 1881, advanced to Messrs. Carrara & Co. 2,000*l.* on mortgage of the *Ardenlea*, which was further secured by two bills of the mortgagors for 1,000*l.* each payable at six months' and twelve months' date respectively. The mortgage was effected on Nov. 1st, 1881. The plaintiffs further agreed with Carrara & Co. to have the *Ardenlea* insured for the proposed voyage at the expense of the mortgagors. The *Ardenlea* was an old ship, and it was intended that she should go in ballast from Greenock to Cardiff, and take a cargo of coal from Cardiff to Gibraltar, where she was afterwards to be used as a coal hulk. The plaintiffs obtained a quotation for insurance of the *Ardenlea* to Gibraltar at 8*l.* 8*s.* per cent., and thereupon informed Carrara & Co. that they had covered the risk to Gibraltar at this rate. In fact this insurance was never carried out, and the only insurance the plaintiffs were able subsequently to effect was the one in question against "absolute total loss" only from Greenock to Cardiff. The *Ardenlea* sailed from Greenock on November 18th, and on November 22nd she collided with a steamer and took the ground in Rothesay Bay, being very seriously damaged. Carrara & Co. thereupon gave notice to the defendants that they should regard them as insurers of the ship. On 29th November the plaintiffs gave notice of abandonment to the defendants. Both the plaintiffs and defendants having taken steps to ascertain the condition of the *Ardenlea*, came to the conclusion that she was a constructive total loss as she lay in Rothesay Bay. On 26th January, 1882, the ship was sold as she lay with the defendants' sanction, the sale to be without prejudice to the rights of the parties. At the time of the sale she had

become from exposure to the perils of the sea a total wreck. After the sale Carrara & Co. brought an action against the defendants for breach of their contract to insure, and recovered as damages the full value of the ship.

At the time of the sale the plaintiffs were still mortgagees of the ship, but before this action was commenced their mortgage had been paid off by Carrara & Co., the two bills being met at their due date.

Witnesses were called for the defendants to show that the words "absolute total loss" had a recognized meaning; viz., the absolute destruction or disappearance of the vessel, but their evidence failed to establish this.

Cohen, Q.C. (with him *Moulton*) for the plaintiffs.

First as to insurable interest; the question is not merely whether the plaintiffs had an insurable interest in the ship at the date of the policy, but whether they had acquired an interest at the time of the loss. (*Arnould on Insurance*, 3rd edit., Vol. i. 234; *Seagrave v. The Union Marine Insurance Co.*, L. R., 1 C. P. 305.) Interest is alleged in the plaintiff or in Carrara, and one or other was interested at the time of the loss. Carrara has abandoned the ship to the plaintiffs, and so transferred his interest to them as mortgagees. The insurance was intended to be on behalf of the plaintiffs and Carrara. In substance the plaintiffs were insured in respect of the liability of Carrara to them. The interest need not be described in the policy. (*Mackenzie v. Whitworth*, L. R. 1 Ex. D. 86.) Secondly, the *Ardenlea*, when stranded was an absolute total loss within the meaning of the policy. She was a constructive total loss at the time of stranding under such circumstances that a prudent uninsured owner would have done nothing to her. And she afterwards became by the perils of the sea an absolute total loss; therefore the underwriters are liable under their policy (*Shepherd v. Henderson*, L. R. 7 App. Cases, 49; *Stringer v. The English, &c. Insurance Company*, L. R. 4 Q. B. 676.) If she had not been sold she would have gone to pieces where she lay, and it is clear the underwriters would then have been liable for a total loss; but there can be an absolute total loss, although there may be planks sticking together (*Adams v. Mackenzie*, 32 L. J. C. P. 92.) If not, this insurance would be against

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foundering only. There can be a total loss by sale, which is a loss by perils of the seas (*The Karnak*, L. R. 2 P. C. 505.) It was a necessary consequence of what happened to the ship that a prudent uninsured owner would have let her lie, but due notice of abandonment was given, and the effect of that was to throw the consequences of neglect, if any, on the underwriters, and the assured is relieved from doing anything after a reasonable time. He need only act reasonably. He also cited *Mullett v. Shedden* (13 East, 304); *Fleming v. Smith* (1 H. of L. Cas. 513).

C. Russell, Q.C. (*Barnes* with him) for the defendants.—As to the first point; this policy is in the name of the brokers, and what was intended to be recovered was Carrara's interest in the ship. The plaintiffs are no parties to it *ex facie*; therefore, only the brokers, or Carrara, can sue on it. If the policy were intended to cover both the plaintiffs' and Carrara's interest, in fact it does not do so, as Carrara has repudiated the policy altogether. The plaintiffs have been indemnified by the payment of the bills; therefore, if theirs was the only interest intended to be covered, they cannot recover against the defendants. Secondly, there has been no loss within the meaning of the policy. If the plaintiffs' contention is right, no effect is given to the word "absolute." It must be contrasted with "constructive." No doubt if, before the voyage was abandoned and without any fault of the assured, a constructive became an absolute total loss, the underwriters might be liable, but the plaintiffs were guilty of neglect in allowing the ship to remain where she lay, so long without doing anything. She never was a "wreck." No prudent uninsured owner would have allowed this vessel to remain for two months exposed to wind and wave. The sale does not alter the character of the loss; this is determined by the circumstances (*Gardner v. Salvador*, 1 Mood. & Rob. 117). They also cited *Farnworth v. Hyde* (L. R. 2 C. P. 204); *Powell v. Gudgeon* (5 M. & S. 497); *Martin v. Crockatt* (14 East, 465).

Cohen, Q.C., in reply, cited *Cambridge v. Anderton* (2 B. & C. 691); *Idle v. The Royal Exchange Co.* (8 Taunt. 755).

January 24. MATHEW, J., after stating the facts, continued:—The question which is raised in this action is one which has

never before been discussed in a Court of law. It is a very important one. It is said for the defendant, first, that the plaintiffs had no insurable interest in this ship, that the insurance was effected to cover either the mortgagor's interest or the mortgagee's interest, or both; that if the mortgagees' interest was intended to be covered, they had been paid off by the mortgagors; if the mortgagors, then they repudiated the insurance as not one which they had authorized. If both interests were intended to be covered, the result is the same, as two negatives do not make an affirmative. I am of opinion that the policy covered both interests. There was no necessity for the interest to be stated in the policy. Carrara & Co., the mortgagors, had had no intention of exonerating the underwriters from their liability on this policy; what they had done was to look to the plaintiffs, as their underwriters, for indemnity for the loss, and cede to the plaintiffs all their (the mortgagors') interest in the policy now sued on. There is no ground upon which the defendants can complain of such a transaction. The objection, therefore, as to want of insurable interest in the plaintiff, must fail.

Secondly, the defendants contended that there had been no absolute total loss of the *Ardenlea* within the meaning of the policy. Witnesses were called by the defendants to show that these words had a peculiar meaning, but the evidence failed to show that the words had other than their usual and ordinary meaning, and therefore no question of custom arises. In my opinion, the words "absolute total loss" must be construed in contradistinction to "constructive total loss." The defendants prudently would have nothing to do with an insurance against constructive total loss, and endeavoured to restrict their liability to a loss which would not be affected one way or the other by notice of abandonment. I am satisfied that the *Ardenlea* was in November a constructive total loss. From that time till her sale in January she lay exposed to the perils of the seas, and was when sold a complete wreck. It is quite clear that she could not have been restored to her former character of a seagoing ship. The case of *Cambridge v. Anderton* (2 B. & C. 691) applies. It was contended for the defendants that what was at first only a constructive total loss, had grown into an absolute total loss through the neglect of the plaintiffs, and therefore the defendants were not liable,

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but the expense of removal of the damaged ship to a place of safety where she could be repaired, and the expense of repairing her when there, was such that no prudent owner would have undertaken it, and the plaintiffs were not called upon under such circumstances to throw away their money. The ship was lost and became a complete wreck from perils of the seas, continuous upon and concurrent with her first striking on the rocks in Rothesay Bay. The cases of *Mullett v. Sheddon* (13 East, 304) and *Stringer v. The English, &c. Insurance Co.* (L. R. 4 Q. B. D. 676), are authorities in point. There must be judgment for the plaintiffs.

Blewitt & Tyler.

Walton, Bubbs & Walton.

MATHEW, J.

1885.
 January 21.

BURRA v. RICARDO.

A stockbroker, member of the London Stock Exchange, deposited bonds as a security for a loan with a stock and share dealer, a member of the London Stock Exchange. On the day on which such a loan is repayable, the practice is for the lender to send back the securities to the borrower in the morning, and for the borrower later in the day to send a good cheque to the lender for the amount of the loan, or else to return the securities, or other securities of equal value. The lender sent back the securities to the borrower on the morning on which the loan was repayable.

THIS was an action to recover a sum of 10,500*l.*, the value of certain Cape of Good Hope Bonds, and of certain Victoria Bonds. The main question was as to whether the defendants had lost their right to the bonds as a security for a debt, and on this point the material facts were as follows :—

On the 7th of November, 1883, a firm of Thomas & Co., stock and share brokers on the Stock Exchange (of which Blakeway and Thomas were the members), bought on the instructions of the plaintiffs 5000*l.* Cape of Good Hope 4½ per cent. Bonds, and 5000*l.* Victoria 5 per cent. Bonds. These bonds were payable to bearer, and were delivered to Thomas & Co. before the end of November, and the price of them was paid by the plaintiffs, through Thomas & Co., to the sellers. The bonds were not, however, delivered over to the plaintiffs by Thomas & Co., Blakeway, who had the conduct of the transaction, pretending when applications were made by the

Held, that this did not affect the lender's right to the securities, if the borrower did not give him a good cheque for the loan, or send him other securities of a value equal to that of the securities sent back,

plaintiffs, that his firm could not get delivery of them from the sellers.

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On the 31st of December, 1883, Blakeway fraudulently deposited the bonds, together with about 12,000*l.* worth of Indian rupee paper, also payable to bearer, with the defendants, stock and share dealers on the Stock Exchange, to secure an advance of 20,000*l.* made by the defendants to the firm of Thomas & Co. This loan was repayable on the 16th of January, 1884, but the time was then extended until the 30th of January, 1884. On the morning of that day, the defendants' clerk, in accordance with the usual practice among stock dealers and brokers when the day arrives for the repayment of a loan secured by a deposit of stock, took back all the bonds and the rupee paper to the office of Thomas & Co., the defendants expecting in the ordinary course a cheque for the amount of the loan during the course of the day. At about two o'clock p.m. on the same day Thomas & Co. announced that they had suspended payment, Blakeway having previously absconded. Later on in the same day one of the defendant's firm went to the office of Thomas & Co. and obtained possession of the bonds, and took them away with him, with the consent of Thomas, the other partner in the firm. The defendants sold the bonds, and applied the proceeds in part satisfaction of the loan made by them to Thomas & Co. The evidence showed that when stock was sent back in the way above described, the understanding was that a cheque for the amount of the loan should be given by the borrowers on the same day, otherwise that the stock, or other securities of equal value, should be sent back to the lenders on the same day.*

The firm of Thomas & Co. were declared defaulters on the Stock Exchange, and also made bankrupt, and a trustee in bankruptcy had been appointed.

Russell, Q.C., and *Pollard* for the plaintiffs contended that

* After applying the proceeds of the securities in satisfaction of their debt the defendants had a balance of over £1,300 in their hands. Of this they applied over £100 in paying off a balance due to them from Thomas & Co. on

another account, and the remainder (about £1,200) they paid over to the official assignee of the Stock Exchange; but it has not been deemed necessary to report the case as to these matters.

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on the bonds being returned to the office of Thomas & Co. the defendant's right to them ceased, and that from that moment the defendants were only entitled to rely on the personal obligation of Thomas & Co. to repay the amount of the loan: and that if this were so, the subsequent resumption of possession of the bonds by the defendants could not better their position as against the plaintiffs.

Sir F. Herschell, S.-G., and *R. S. Wright* for the defendants, contended that their right to the bonds was not destroyed by the bonds being sent back to the office of Thomas & Co. There was no intention by so doing to affect in any way the legal rights of the defendants: the thing being only done for the convenience of business. Thomas & Co. held them as trustees for the defendants until the loan was repaid. Further, the defendants subsequently resumed possession with the assent of Thomas. They cited *Mocatta v. Bell* (27 L. J. Ch. 237; 24 Beav. 585).

MATHEW, J. (after stating the facts as above set out).—The plaintiffs say:—It is true that as the bonds were payable to bearer the defendants got a valid title to the bonds by the deposit; but that security was given up on the morning of the 30th of January: the defendants then took Thomas & Co.'s promise to pay, in lieu of their security, and the title of the real owners of the bonds revived. Now evidence has been directed to show the course of business as to sending back the securities, and I think it is clear that there was no intention to surrender the security of the bonds: but that a fiduciary relation was established between Thomas & Co. and the defendants, by virtue of which Thomas & Co. were to pay their debt by a good cheque, or else to return the securities, or to return in substitution other securities of equal value. If this were not so, Thomas & Co. could immediately deal with the securities just as they liked, and the defendants be deprived entirely of their security, which would be abandoned on the last and most critical day of all: but I am of opinion that the security was not impeached at all by the bonds being sent back in the morning. Further, I think that in any case the defendant's title was rendered unimpeachable by what took place on the afternoon of January 30th. The second partner, Thomas, then gave permission to one of the defendants,

Parker, who came for the securities, to take them back, and directed a clerk to fetch them. Parker accordingly gave a receipt for the bonds, and took them away. I come to the conclusion that the plaintiffs have no right against the defendants, in respect of these bonds, so far as the defendants were realizing their security. [His Lordship then dealt with the question as to the plaintiff's right to recover from the defendant the surplus of 1800*l.*, after realizing the security, and decided that the plaintiffs had no such right.]

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Judgment for the defendants.

Lawrance, Plews & Baker.

Williamson, Hill & Co.

MATHEW, J.

HILL AND ANOTHER *v.* EDWARD.

1885.
January 31.

THIS was an action by the executors of a landlord to recover from a tenant a sum of 104*l.* 12*s.* 9*d.* paid by the plaintiffs to the local authorities in respect of the sewerage, levelling, and paving of the roads on which the demised premises abutted.

By lease made on February 16th, 1877, the plaintiff's testator let to the defendant certain premises for twenty-one years from Lady Day, 1877 (the term being determinable at the end of the seventh or fourteenth year), at a yearly rent of 114*l.* payable quarterly. The lease contained the following covenant:—

"The said G. S. Edward doth hereby covenant with W. Love, his executors, administrators and assigns, that he the said G. S. Edward will pay the rent hereby reserved on the days and in the manner hereinbefore mentioned, and will pay the tithe or rent-charge in lieu of tithes, land-tax (if any), sewers' rates, main-drainage rates, and all other taxes, rates, assessments and impositions and outgoings whatsoever then

A lessee covenanted to pay the tithe or rent-charge in lieu of tithes, land tax (if any), sewers' rates, main-drainage rates, and all other taxes, rates, assessments, and impositions and outgoings whatsoever, then or thereafter to be charged or imposed on or in respect of the said premises, or any part thereof. Held, that the lessee was not liable to pay the amount charged, by the urban authority for sewerage, levelling and paving the road on which the demised premises abutted, under s. 150 of the Public Health Act, 1875.

mises abutted, under s. 150 of the Public

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or thereafter to be charged or imposed on or in respect of the said premises or any part thereof (except the landlord's property tax), and will also pay a fair proportion with the owners or occupiers of the other houses abutting thereon of the expense of keeping in repair and lighting the roadway and footpath in front of the said premises until the same shall be taken by the parish, the amount of such proportion to be settled by the surveyor for the time being of the trustees of the London Diocesan Penitentiary, the superior landlords."

In December, 1882, the Hornsey Local Board, the urban authority of the district in which the demised premises were situated, duly served the notice required by s. 150 of the Public Health Act, 1875, requiring the owners or occupiers to sewer, level, pave, metal, flag, and make good the portion of the street on which the demised premises abutted; and this not being done, the Local Board did the work themselves, and apportioned the sum of 107*l.* 6*s.* 5*d.* as the sum chargeable in respect of the demised premises. This sum, less 2½ per cent. discount, the plaintiffs paid, and now sought to recover the amount of 104*l.* 12*s.* 11*d.* from the defendant under the covenant hereinbefore set out.

S. Dickinson, for the plaintiffs.—This was clearly an imposition, and outgoing charged or imposed on or in respect of the premises. He cited *Payne v. Burridge* (12 M. & W. 727); *Thompson v. Lapworth* (L. R. 3 C. P. 149); *Crosse v. Raw* (L. R. 9 Ex. 209); *Hartley v. Hudson* (L. R. 4 C. P. D. 367); *Midgley v. Coppock* (L. R. 4 Ex. D. 309); *Budd v. Marshall* (L. R. 5 C. P. D. 481).

Lumley Smith, Q.C., and *H. Terrell* for the defendant.—The charge is a charge on the owner in respect of the premises. The word "impositions" must be construed as *ejusdem generis* with the specific words previously enumerated. He cited *Leadbitter's Case* (3 T. R. 458); *Tidswell v. Whitworth* (L. R. 2 C. P. 326); *Rawlins v. Briggs* (L. R. 3 C. P. D. 368); *Allum v. Dickinson* (L. R. 9 Q. B. D. 632 (C. A.)); and *Wilkinson v. Collyer* (L. R. 13 Q. B. D. 1).

S. Dickinson in reply.—The doctrine of *ejusdem generis* is as Willes, J., said in *Thompson v. Lapworth*, a captivating

one, and, therefore, a dangerous one to act upon. It probably arose from a desire to restrain the generality of sweeping words in wills: it must not be applied so as to interfere with the rule that full effect must be given, as far as possible, to all the terms used in written instruments.

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MATHEW, J. (after stating the facts, continued).—Mr. Dickinson ably argued that the measure of the tenant's liability must be ascertained by reference to the strongest word used, viz., "imposition;" and that it was a mistake to apply the maxim *noscitur à sociis*, and the doctrine of *ejusdem generis*. Mr. Lumley Smith contended that this latter doctrine was applicable, and that the word "imposition" meant a charge, which, like those specifically enumerated, was ordinarily cast upon the tenant. There are a great number of authorities bearing on this subject, but I have arrived at the conclusion that the case of *Tidswell v. Whitworth* governs this case, and that it has not been overthrown by *Thompson v. Lapworth*, but has survived, inasmuch as it has been followed in more recent cases.

February 7.

In all the cases cited on behalf of the plaintiffs the covenant expressly cast on the tenant an obligation to pay all that which would otherwise be payable by the landlord. Thus, in *Thompson v. Lapworth*, the words are "pay and discharge all taxes, rates, duties and assessments. . . . taxed, assessed, or imposed on the tenant or landlord of the premises." In *Budd v. Marshall* there is the word "duties" and the words "landlords or tenant." In *Hartley v. Hudson* the words were "all rates, taxes, charges and assessments whatsoever which now are or may be charged or assessed upon the said premises or any part thereof, or upon any person or persons in respect thereof." In *Crosse v. Raw* there are the words "imposed upon the said demised premises or upon the landlord or tenant in respect thereof."

What is the nature of the liability created by the Public Health Act? The charge is clearly an owner's charge, and only on his default does it become a charge upon the premises. It is observable, too, that this lease was executed after the passing of the Public Health Act, and after there had been some authorities on the subject. I think the word "imposi-

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tion" must have a restrictive meaning: otherwise it would include a charge created by the landlord himself.

Judgment for the defendant.

Janson, Cobb, Pearson, & Co.

Tatham & Son.

MATHEW, J.

1885.

February 6.

CLAPHAM v. DRAPER.

A landlord who has wrongfully evicted his tenant between two quarter-days is not entitled to the apportioned rent up to the day of eviction, under the Apportionment Act, 1870.

In this action, which was brought by a tenant against his landlord for having been evicted from the demised premises, the defendant counter-claimed for the apportioned rent from March 25th up to June 11th, 1884, the date of the eviction. The eviction on June 11th was owing to the superior landlord determining to pull down and alter the premises.

Moulton, for the plaintiff.

Lumley Smith, Q.C., and *Sylvester*, for the defendant.

MATHEW, J.—In my opinion, the Apportionment Act, 1870, was not intended to alter and did not alter the law, in the case of involuntary eviction. The eviction was before the quarter-day in June, and therefore no rent is payable.

C. K. Elderton.

Few & Co.

As to the effect, on payment of rent, of a lawful eviction, see *Wainwright v. Ramsden*, 5 M. & W. 602.

STEPHEN, J.

ST. CROIX *v.* MORRIS.

1885.

February 18.

THIS was an action on a dishonoured cheque, to which the defence was, that it had been given in payment of a gambling debt.

A cheque given in payment for counters obtained from the secretary of a club to enable the purchaser to gamble at cards, cannot be sued upon by the secretary.

The plaintiff was the secretary of a club where the defendant had played baccarat with four people while the plaintiff looked on. Counters were used for making payments in the game; which were sold by the plaintiff to the players for money. The defendant had obtained counters from the plaintiff to pay for his losses in the game, and subsequently gave the cheque sued on in payment for the counters.

H. Terrell for the plaintiff contended that the plaintiff was entitled to recover, as he was no party to the gambling transaction, and that the contract with the defendant was only ancillary thereto. He cited *Ex parte Dyke* (L. R. 8 Ch. Div. 754); *Savage v. Madden* (86 L. J. Ex. 178); *Beeston v. Beeston* (L. R. 1 Ex. Div. 13); *Thacker v. Hardy* (L. R. 4 Q. B. D. 607); *Read v. Anderson* (L. R. 10 Q. B. D. 100); *Lynch v. Goodwin* (26 Sol. Jour. 589).

Kemp, Q.C., and *Archibald* for the defendant.

STEPHEN, J.—My judgment must be for the defendant. It is true the plaintiff did not actually join in the game, but he looked on, and in effect took part in the gambling transaction. The giving of the cheque was not ancillary to the gambling. It was part of the transaction. It was given in payment of a gambling debt there and then to a person who was really a party to the transaction.

F. FitzPayne.

J. Holder.

SMITH, J.

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February 18.LAPTHORNE AND ANOTHER *v.* ST. AUBYN AND
OTHERS.

A building contract provided, (1) that the builders were not to vary or deviate from the drawings or specifications, or execute any extra work of any kind whatsoever, unless upon the authority of the architect, to be shown, as in the contract stated, and that in all cases where such extras or variations exceeded the sum of 10*l.*, the order or plan was to be further countersigned by two members of the Building Committee; (2) that the contract price should be paid within one month after the architect should have certified in writing that the whole of the said building had been completed and finished to his satisfaction; (3) that the decision of the architect with respect to the amount, state

THIS was an action by builders for 1179*l.* 14*s.* 3*d.*, the balance of price for work done under a building contract, and for extras. The defendants paid 600*l.* into Court, and denied their liability to pay the residue.

The defendants were the Building Committee for the erection of sections of a church at Fording, in the parish of Stoke Damerel, in the county of Devon; and they entered into two contracts, on the 25th of April, 1882, and the 14th of August, 1882, with the plaintiffs, to execute the necessary works according to plans and specifications. The work, with certain variations and extras, had been completed, and a final certificate had been given by the architect, one Norman, for the amount sued for in this action.

The defendants denied their liability for any amount beyond the sum paid into Court on the grounds that (1) the architect had by mistake certified for work not done, and improperly done; (2) that his certificate included extras for an amount over 10*l.*, the orders for which had not been countersigned as required by the contract; (3) that he had not made sufficient allowances for work not done.

The following are the material clauses in the contract of the 25th of April, 1882:—

1. The builders shall and will well and substantially make, erect, &c. . . . and will complete all the said works with materials of the best quality, to the satisfaction of the said Alfred Norman, or other the architect for the time being

and condition of the works actually executed, and also in respect of any and every question that might arise concerning the construction of the present contract, or the said plans drawings, elevations, and specifications, or the execution of the works thereby contracted for, or in anywise relating thereto, should be final and without appeal. On the completion of the work, the architect certified that a certain sum was due, which sum included the price of extras above 10*l.*, which had not been countersigned as required by the contract.

Held, that the building owners could not resist payment of any part of this sum, on the grounds, (1) that the architect had by mistake certified for work not done, and improperly done; (2) that his certificate included extras for an amount over 10*l.*, the order for which had not been countersigned by two members of the Building Committee; (3) that the architect had not made sufficient allowances for work not done.

of the said Building Committee, without reference to any other person.

5. The architect is to have at all times free access to the works, which are to be entirely under his control. He may require the builders to dismiss any person in the builders' employ upon the works, who may be incompetent or misconduct himself, and the builders are forthwith to comply with such requirement.

6. The builders are not to vary or deviate from the drawings or specifications, or execute any extra work of any kind whatsoever, unless upon the authority of the architect, to be sufficiently shown by any order in writing, or by any plan or drawing expressly given and signed or initialled by him as an extra or variation, or by a subsequent written approval signed or initialled by him. In all cases where such extra or variation exceeds the sum of 10*l.*, the order or plan to be further countersigned by two members of the Building Committee.

10. The sum of 1645*l.* (the contract price) shall be paid to the builders in manner following, viz., 75*l.* for every 100*l.* worth of work certified by the said architect to have been done and executed, in sums of not less than 100*l.*, and the balance of the said sum of 1645*l.*, less the sum of 100*l.* which is to be retained by the Building Committee for the period of three months, shall be paid within one month after the said Alfred Norman or such other architect as aforesaid shall have certified in writing that the whole of the said building has been completed and finished to his satisfaction.

11. The decision of the said Alfred Norman, or such other architect as aforesaid, with respect to the amount, state and condition of the works actually executed, and also in respect of any and every question that may arise concerning the construction of the present contract, or the said plans, drawings, elevations and specifications, or the execution of the works hereby contracted for, or in anywise relating thereto, shall be final, and without appeal.

Charles, Q.C., and *Pitt Lewis* for the plaintiffs, contended that in the absence of fraud or collusion it was not competent for either party to go behind the certificate of the architect. They cited *Goodyear v. Mayor of Weymouth*, 85 L. J. C. P.

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12; *Laidlaw v. Mayor, &c., of Hastings* (reported in Jenkins and Raymond on Building Contracts, p. 238, 3rd edition).

Finlay, Q.C., and *Warr* for the defendants.—Although we do not charge the architect with fraud or collusion, still if he has by mistake, carelessness or inadvertence, included in the certificate what he ought not to have included, we ought not to be precluded from showing that he has done so. Further, however wide the powers of the architect may be under the contract, the contract expressly provides that the orders for extras exceeding 10*l.* shall be countersigned by two members of the Building Committee, and this has not been done in many instances.

SMITH, J.—The question turns upon the proper construction of the contract, and the contract denotes pretty clearly, I think, what the intention of the parties to it was. Both the building owners and the builder put themselves, in my opinion, under the thumb of the architect, and both parties equally are bound by his decision, in the absence of fraud or collusion. Here the building owners are complaining of his certificate: but it must be remembered that it is generally the building owner who appoints the architect, and that the architect has prepared for him plans, &c., for the intended building. The fair result of the contract therefore is, that the one party will pay, and the other be content with what the architect considers fair and proper. Again, this is a contract clearly contemplating extras. Yet the certificate which is to be final is one dealing with all the work executed, which work would include any extras executed. The clause in *Laidlaw's case* (reported in full in Jenkins and Raymond on Building Contracts) was very similar to this one, and I think the decision there really governs this case. I therefore hold it is not competent for the defendants to re-open or quarrel with the certificate on any of the grounds alleged.

Judgment for the plaintiffs for amount claimed.

*Crowder, Anstie &
 Vizard.*

*Park, Nelson, Morgan
 & Gemmell.*

STEPHEN, J.

DE MATTOS v. GREAT EASTERN STEAMSHIP COMPANY.

1885.

February 19.

THIS was an action by an intending purchaser of the steamship *Great Eastern* against the vendors for damages for breach of contract in refusing to complete the sale. His Lordship decided that there had been a breach of contract, and the question arose, what damages were recoverable by the plaintiff?

The contract price of the vessel was 50,000*l.* The plaintiff had deposited 2,000*l.* with the defendants on making the contract, and had spent about 600*l.* more in commission and expenses. The evidence shewed that the vessel had proved a failure so far as the ordinary purpose of a steamship, viz., the carriage of cargo, was concerned. She had, however, been profitably employed in laying the Atlantic cable; she had recently been chartered for 6,000*l.* to go to New Orleans to be exhibited there, and used as a floating hotel at the Exhibition. The plaintiff bought her for the purpose of using her as a coal-hulk at Gibraltar; and he estimated that, used for this purpose, she would have brought him in 5,000*l.* to 7,000*l.* per annum. The use which the plaintiff intended to make of the vessel was unknown to the defendants at the time the contract of sale was entered into.

On breach of contract by the seller to deliver an article obviously valueless, if used for the purpose for which such an article is ordinarily used, the buyer is entitled to recover damages based on the value of the article, if used for the specific purpose for which the buyer bought it, although such specific purpose were unknown to the seller at the time of the sale. Such value may be ascertained by considering the net annual profits to be obtained from such specific use of the article.

Webster, Q.C., and Pollard, for the plaintiff.—No doubt it is difficult to assess the damage when, as here, the article is unique, and has not got an ordinary market price; but the evidence as to the annual profits which the plaintiff expected to get from the use of the ship, shews that it was of greater value than the 50,000*l.* he was to give for it. They cited *Cory v. The Thames Ironworks and Shipbuilding Company*, L. R. 8 Q. B. 181.

Charles, Q.C., Candy, and Evill, for the defendants:—The case cited by the plaintiff's counsel is against their contention: for it was there conceded that the plaintiff could not recover what he had lost by reason of not having been

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able to put the derrick to a specific use, unknown to the defendants at the time of the sale. The plaintiff here has given no evidence of value other than his expected profits from the use of the vessel for a specific purpose unknown to the defendants.

STEPHEN, J.—I cannot, and am not going to, lay down any definite principle as to the measure of damages in this case. The case falls within the first rule in *Hadley v. Baxendale* (9 Ex. 341; 23 L. J. Ex. 179); but as the defendants were not aware of the use to which the plaintiff intended to put the vessel, it does not fall within the second rule. The contract was made with reference to an article almost unique. It was no longer used as a cargo-carrying vessel; but it had been used and could be used for other purposes. Thus it had been used for laying down the electric cable in the Atlantic: and it was intended to be used by the plaintiff as a coal-hulk at Gibraltar: and the use of vessels for this purpose is a well-known branch of business. The plaintiff's evidence shewed that its use as a coal-hulk would have been very valuable: and that it could have been let for from 5,000*l.* to 7,000*l.* a year. He therefore had agreed to give 50,000*l.* for a thing which would have had the power of earning, say, 6,000*l.* a year. His money would thus have been invested at the rate of about 12 per cent.: but subject, of course, to the ordinary risks of the business. Looking at the matter in this way, I have to arrive, as best I can, at what I think he has lost by the breach of contract; and I arrive at the conclusion that, in addition to the amount to which he is entitled, as return of deposit, commission paid by him, and out of pocket expenses, he should have such a sum as will give him 5,000*l.* in all.

Crundell & Co.

*Gregory, Rowcliffes, Rawle
& Johnson.*

STEPHEN, J.

MILES AND OTHERS v. SCOTTING.

1885.

February 20.

THE plaintiffs, the trustees of an Independent Mutual Friendly Society, sought in this action to recover from the defendant a sum of 50*l.* under the following circumstances. Previously and up to the year 1883 the defendant was the manager of the society: he was also one of its trustees. His salary as manager up to the end of the year 1882 was 200*l.* a year. In April, 1883, a resolution was carried at a meeting of the committee of the society that the defendant be paid 800*l.* a year in consideration of devoting the whole of his time to the business of the society. This resolution was confirmed by a general meeting of the society held in June, 1883. Immediately after this meeting the defendant applied to the treasurer of the society for 50*l.* as increased salary from December, 1882, till June, 1883. An order for payment of the amount was duly signed by three of the trustees of the society (the defendant being one of the three), and thereupon the treasurer paid the amount to the defendant. The treasurer and the three trustees who signed the order for payment were all present, both at the committee meeting in April, 1883, and at the general meeting in June, 1883. The treasurer's account shewing the payment of the 50*l.* to the defendant was subsequently passed by the general committee.

The doctrine that money paid under a mistake cannot be recovered back unless the mistake be one of fact, applies even though the person receiving the payment be one of the persons authorising it to be made.

Collins, Q.C., and *Rolland*, for the plaintiffs.—The resolution was not retrospective, and the defendant had, therefore, no right to the increased salary before June, 1883.

Elliott, for the defendant.—Even if the resolution was not retrospective, still the plaintiffs cannot recover back the money. It was not paid under any mistake of fact. He cited *Skyring v. Greenwood*, 4 B. & C. 281; *Brisbane v. Dacres*, 5 Taunton, 143.

Collins, Q.C., in reply.—The doctrine relied on by the defendant cannot apply where the receiver of the money is himself one of the payers.

STEPHEN, J. (after stating that he was clearly of opinion that the resolution was not retrospective, and that the defen-

February 21.

1885.	dant was not entitled to have received the 50 <i>l.</i>), continued :—
MILES AND OTHERS v. SCOTTING.	But the question is, Can the plaintiffs, having paid it, recover it back? The cases clearly establish that, whilst money paid with knowledge of the facts cannot be recovered back, money paid under a mistake of fact can. Was, then, this payment made under a mistake of fact? It is said that the defendant was himself a trustee, and had interpreted the law in his own favour. But I find that the payment was made in the ordinary course, and according to the provisions of the rules of the society. All was done regularly. The accounts were brought forward, and passed by the general committee in the ordinary course. The defendant claimed payment as from the commencement of the year, and he was paid. There is no fraud here, and no mistake of fact, and therefore the plaintiffs cannot recover back the money.

Montagu, Scott, Baker & Co.

F. Cartwright.

HUDDLESTON, B.

SAYER v. HATTON.

1885.
February 25.

Where in an action for damages for personal injuries it appears from the plaintiff's own evidence that the injuries he sustained were partially attributable to his omission to take ordinary precautions against a danger created by the defendant's breach of duty, there is no case to go to the jury

THIS was an action to recover damages for personal injuries sustained by the plaintiff.

The plaintiff was tenant to the defendant of certain stables, the entrance to which was through a doorway consisting of a right hand door and a left hand door. In February, 1883, the woodwork of the right hand door was rotting; the plaintiff complained of this to the defendant, and the defendant said, "I'm going to put up new gates shortly." In March, 1883, the bottom hinge of the right hand door cracked, and in April, 1883, it broke right in two. The plaintiff took part of it off and shewed it to the defendant. The defendant said that he would see to it. The plaintiff deposed that after the hinge broke, when he opened the doors he used to open the left hand door first, and then to put the right hand door back against the wall, so that it might not fall, as there was no support to the bottom after the lower hinge was broken.

On one day in June, 1883, the plaintiff on entering the stables did not put the right hand door back as he generally

did, but only touched that door to take the bar off. As he was then walking in, the right hand door fell on him and injured him.

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Bowen Rowlands, Q.C., and Kisch, for the plaintiff.

Murphy, Q.C., and Morten, for the defendant.

The following cases were cited :—*Burrows v. March Gas and Coke Company*, L. R. 7 Ex. 96; *Davey v. South-Western Railway Company*, L. R. 12 Q. B. D. 70; *Griffiths v. London & St. Katharine's Docks Company*, L. R. 13 Q. B. D. 259.

HUDDLESTON, B.—For the defendant: it is said that, assuming him to be bound to repair, still he is under no liability in this action; because the plaintiff knew that the door was in a dangerous and unsafe condition, and, knowing this, he yet chose to run the risk. It is put in two ways:—first, the plaintiff knew of the danger and cannot complain of the consequences; secondly, the plaintiff did not use reasonable care in avoiding the consequences of the danger. Now what are the facts? (His Lordship stated them.) It is clear, therefore, that the plaintiff knew of the unsafe condition of the door; and, knowing it, he nevertheless omitted on the occasion of the accident to put the door back, as he usually did. He therefore failed to use that ordinary precaution he ought to have used if he intended to go on using a door which he knew was dangerous. It is clear, therefore, on his own admission, that he was guilty of contributory negligence. I cannot, therefore, say that there is anything for me to leave to the jury. The cases of *Griffiths* and *Davey* are in point for the defendant. The case of *Burrows* has no application to the present. There really was no previous knowledge there.

Judgment for defendant.

H. B. Forbes.

Shaen, Roscoe & Co.

. In actions of negligence, the onus of proving negligence is on the plaintiff; and the onus of proving contributory negligence (if pleaded) is on the defendant. It follows, therefore, that if the plaintiff adduce evidence of negligence on the defendant's part, even though the

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evidence for the plaintiff also discloses evidence of contributory negligence on the plaintiff's part, the Judge is no more entitled to withdraw the case from the jury and direct a verdict for the defendant than he would be entitled to withdraw the case from the jury and direct a verdict for the plaintiff, if at the close of the defendant's case the evidence adduced on the part of the defendant discloses evidence of negligence on the part of the defendant. (See the judgment of Lord Penzance in *Slattery v. Dublin, Wicklow, & Wexford Railway Company*, L. R. 3 App. Cas. p. 1173.) Negligence is always an inference of fact, and however strongly the facts from which that inference is to be drawn, point to its existence, still it is for the jury and not for the judge to draw the inference.

It must, however, be always remembered that in actions founded on negligence it is incumbent on the plaintiff to prove not only negligence but negligence *directly causing* the alleged damage. Now, if the plaintiff's evidence reveal a state of facts showing that the damage was directly caused by the plaintiff's own acts, the Judge is entitled to withdraw the case from the jury; but this is not on the ground that there is proof of contributory negligence (though the facts are almost certain to point strongly to its existence), but on the ground that the plaintiff has failed to adduce evidence of that direct connexion between the negligence of the defendant and the damage to the plaintiff, which the plaintiff is bound to show to entitle him to succeed.

HUDDLESTON, B., and a S. J.

BURFORD v. UNWIN.

1885.

February 25.

A lease of farm lands contained a clause of forfeiture if (*inter alia*) the lessee should underlet or part with the possession of the demised premises, or any part thereof, without the consent in writing of the lessor first had and obtained, provided always that such consent should not be withheld if the proposed assignee or lessee were a respectable and responsible person.

THE plaintiff in this action claimed damages against the defendant for having turned the plaintiff's horses off certain fields. The fields, together with other land and farm property, had been let by the defendant to one Gaisford. The lease to Gaisford contained the following clause:—

“And also that he the said R. H. Gaisford, his executors, administrators or assigns, shall not assign or under-let or otherwise part with the possession of this indenture or of the said demised premises or any part thereof without the consent in writing of the said W. Unwin, his heirs or assigns, for that express purpose under his or their hand or hands first had

Held, that the consent of the lessor was not necessary if the lessee underlet or parted with possession of the premises to a respectable and responsible person.

and obtained: provided always that such consent shall not be withheld if the proposed assignee or lessee is a respectable and responsible person."

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The lease also contained a provision that if "the said R. H. Gaisford, his executors, administrators or assigns, or any of them, shall assign over or otherwise part with this indenture or the premises hereby demised or any part thereof, then it shall and may be lawful for the said W. Unwin, his heirs or assigns, in to the said premises hereby demised or any part thereof in the name of the whole to re-enter and the same again to re-possess and enjoy without being called upon to pay or allow to the said R. H. Gaisford, his executors, administrators or assigns, any sum whatever in respect of any improvements made by him or them in or upon the said demised premises according to the established usage or custom of the country or otherwise."

Gaisford let to the plaintiff the pasturage of the fields aforesaid from Michaelmas to Christmas, 1882, without asking for the permission of the defendant. In October, 1882, Gaisford surrendered his lease to the defendant. In November the defendant turned the plaintiff's horses off the fields.

One question involved in the case was whether the omission to obtain the defendant's permission to let to the plaintiff constituted a forfeiture under the lease.

Finlay, Q.C., and *M. Powell*, for the plaintiff.—There was no forfeiture: for, as there is no suggestion that the plaintiff is not respectable and responsible, the defendant's consent was a mere form. They cited *Hyde v. Warden*, L. R. 3 Ex. D. 72.

The defendant in person.—The lease means what it says: and I ought to have been consulted beforehand in order that I might have formed my opinion as to the respectability and responsibility of the proposed sub-tenant.

HUDDLESTON, B.—I should myself have thought it clear that, on the true construction of the terms of the lease, the landlord's consent ought to be asked for, and that he was constituted the arbiter in the first instance of the respectability and responsibility of the proposed sub-tenant. I am, however,

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bound by the decision in *Hyde v. Warden*, where the words were very similar to those used here. That case decides that the tenant may sub-let without obtaining the landlord's consent, and behind the landlord's back.

C. G. Hobbes.

The defendant in person.

WILLS, J.

1885.
March 7.

MOUNSEY v. RANKIN AND OTHERS.

An agreement to advance money on the security of land is an agreement which requires to be in writing, by sec. 4 of the Statute of Frauds.

THIS was an action for damages for breach of an agreement by the defendant to take a loan on mortgage, by which the defendant agreed to mortgage certain property of his to the plaintiff for 9,000*l*.

One of the defences, raised at the trial at the Liverpool Winter Assizes, was that the agreement was, to take the loan only if offered within a reasonable time, and that it was not so offered; but the jury found that there was no such agreement. The case was reserved for further consideration upon another defence raised by the defendant, viz., that the agreement was one which required to be in writing to satisfy the 4th section of the Statute of Frauds, and that it was not so.

French, for the plaintiff.

Kennedy, for the defendants.

The following authorities were referred to:—*Jeakes v. White*, 6 Exch. 873; *Rogers v. Challis*, 27 Beav. 175; Fry on Specific Performance, pp. 17, 237 (2nd edition); Powell on Mortgages, vol. ii. 1050.

WILLS, J.—I shall take time to look into the authorities upon the question as to whether or no this agreement ought to be in writing to satisfy the 4th section of the Statute of Frauds, as it is difficult to reconcile the *dictum* of Lord Romilly in *Rogers v. Challis* (27 Beav. 175) with the view I

take. If the statute does apply, I am clear upon the facts that it has not been complied with.*

C. A. V.

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WILLS, J.—In this case I reserved my judgment out of the respect due to a supposed *dictum* of a late Master of the Rolls (Lord Romilly) in *Rogers v. Challis* (27 Beav. 175), where he is represented as saying that the Statute of Frauds does not apply to such a case as this is. Upon looking carefully at the case, however, it is clear that the essential part of the decision was that such a contract was not one which equity will specifically perform, and the substance of what is said about the Statute of Frauds is, that the principle involved, and upon which the decision turned, was of a different character altogether from any touching the validity of the contract under the Statute of Frauds. The passage which was cited, too, from Fry on Specific Performance, is of the same character and effect, and lends no colour to the suggestion that such a contract is not within the Statute of Frauds. I am, therefore, quite free from any difficulty on the score of authority for a proposition which to me is incomprehensible. I cannot see how a contract that, in consideration of the plaintiff lending money to the defendant, the defendant will convey to him (subject to a right of redemption) land and buildings, can be anything else than a contract concerning an interest in land. There is direct authority, however, that such a contract must be in writing. It will be found in a decision of the Court of Appeal in *Ex parte Hale, In re Whiting*, L. R. 10 Ch. Div. 615. My judgment must, therefore, be for the defendants with costs, but, inasmuch as they did not confine themselves to the unmeritorious objection, of which they have had the benefit, but set up defences in fact which were negatived by the jury, the defendants must pay the costs of all the issues except that relating to the Statute of Frauds.

Martin, Webb & Hyne.

*Rowe, Pemberton
& Norton.*

* It was contended for the plaintiff that even if the statute did apply there had been a sufficient recognition of the transaction by the defendant to satisfy the statute; but it has not been thought necessary to report the case upon this point.

DAY, J., and a C. J.

1885.
March 17.MORRIS & CO. v. LONDON AND WESTMINSTER
BANK.

Where bankers, owing to a mistake, dishonoured a cheque of a customer, given in the course of business, which mistake was subsequently satisfactorily explained to the payee, but still the payee declined to deal further with the customer. Held, in an action for damages against the bank, that the customer could not recover damages for the loss of the payee's custom.

THIS was an action to recover damages for the dishonour of a cheque and of an acceptance payable at the defendant's bank.

The plaintiff firm, wholesale furriers, had a banking account with the defendants. On August 7th, 1884, the plaintiffs gave one Isaacs, a bill discounter, with whom the plaintiffs were in the habit of dealing, a cheque for 256*l.* 7*s.* 6*d.*, dated August 8th, 1884, drawn on the defendant bank. Isaacs personally presented the cheque at the bank on the morning of the 8th, but it was dishonoured, the bank clerk thinking that there were not sufficient funds of the plaintiffs' in the bank's hands to meet the cheque. There would not have been sufficient funds, but for the fact that, early on the morning of the 8th, the plaintiffs had paid in to their account a sum of about 900*l.* Later in the day, one of the plaintiffs' firm accompanied Isaacs to the bank, where the mistake was satisfactorily explained, and the amount of the cheque paid. Isaacs, however, refused to deal any longer with the plaintiffs' firm, saying that the transaction had revealed that they had such a slender account, and also that it was a rule of his firm never to discount the paper of any firm whose cheques had once been dishonoured.

Digby Seymour, Q.C., and Pigott, for the plaintiffs.
Murphy, Q.C., and French, for the defendants.

DAY, J. (to the jury).—As to the damages for the dishonour of the cheque, the mistake was satisfactorily explained to Isaacs, and the amount paid to him by the defendants on the same day. True it was that Isaacs declined to deal any longer with the plaintiff firm for the reasons which he gave; but you must not give the plaintiffs damages for the loss of Isaac's business; that is damage indirectly resulting, but not legally flowing, from the breach of contract.

W. H. Roberts.

Travers, Smith & Braithwaite.

WILLS, J.

BEVAN *v.* CARR.1885.
March 17.

THIS was an action brought by the plaintiff to recover the balance of a sum of 1,000*l.* (100*l.* of which had been repaid) paid by her for shares in the Leinster Cab Company. After the shares had been allotted to her the plaintiff discovered that misrepresentations had been made as to value, and it was agreed between her and the directors and the defendant Carr (solicitor to the company) that she should return the shares and that they would repay her what she had paid for them. This agreement was come to on the 30th January, 1883, and the repayment was to be as follows:—100*l.* and interest on the 28th February, 1883. The remainder in four instalments; the first instalment on the 1st May, 1883, and the balance quarterly. The proposition as to repayment in this way was made in a letter written by the defendant to the plaintiff, and accepted by her, with a slight modification verbally. Subsequently, before the shares were handed over, the plaintiff, at Carr's request, agreed to hold the shares until the money was repaid.

Where by the terms of a contract one party can perform his part of it within the year, a subsequent request by the other party that such performance should be postponed till after a year, does not bring the case within sec. 4 of the Statute of Frauds, although such request be acceded to.

This action was brought on default of payment of the instalments; and one defence now raised was that the agreement was one which could not be performed within a year from its date, and that the Statute of Frauds, therefore, required that it should be in writing, and that it was not.

French, for the plaintiff, contended that the agreement need not be in writing. For the statute to apply, it must be an agreement which was incapable of performance within a year by both the parties to it. The shares were in fact sold out and out to the defendant at the time of the agreement, and were only held subsequently at Carr's request. He cited *Donellan v. Read*, 3 B. & Ad. 899; *Cheney v. Fleming*, 19 L. J. Ex. 63; *Smith v. Neil*, 26 L. J. C. P. 143.

Terrell, for the defendant, contended that the agreement was one which the Statute of Frauds required should be in writing. The last payment could not be made within the

1885. year, nor could the plaintiff have fulfilled her part, as her
 BEVAN contract was to hand over the shares when payment had been
 v. made, and not before. In the cases cited for the plaintiff,
 CARR. what the one party had to do *was*, by the contract, to be done
 within the year.

WILLS, J.—The plaintiff is entitled to succeed. The defendant might at any moment have revoked his request that the shares should be held for him, and could have claimed delivery of them at once. The property, the subject-matter of the sale, was to be paid for by instalments; but the property became that of the purchaser from the time of sale. The contract here was capable of being performed on the plaintiff's part within the year, and the case is clearly within the authorities cited.

Travers, Smith & Braithwaite.

Carr & Co.

HUDDLESTON, B.

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SCARAMANGA v. MARTIN AND ANOTHER.

April 1.

Underwriters on cargo paid the expenses of saving cargo in jeopardy owing to the negligence of the shipowner. Held, that the cargo-owner could recover these expenses as damages in an action for negligence against the shipowner, and none the less so, because such salvage expenses had been paid under an average adjustment under an agreement.

THIS was an action by cargo owners against shipowners, for negligent navigation.

The facts sufficiently appear from the judgment.

Russell, Q.C., and Barnes, for the plaintiffs.

Sir F. Herschell, S.G., Finlay, Q.C., and Bucknill, for the defendants.

The following cases were cited:—*Sewell v. Burdick*, L. R. 10 App. Cas. 74; *Short v. Simpson*, L. R. 1 C. P. 248; *Armstrong v. The North of England Insurance Association*, L. R. 5 Q. B. 244; *Simpson v. Thompson*, L. R. 3 App. Cas. 279.

HUDDLESTON, B.—This case was tried before me on the 18th and 19th of December last year, and the 27th of January of the present. Points were reserved for further consideration, which were argued before me on the 14th of March.

The action was brought by the plaintiffs upon a charterparty and bill of lading, against the defendants, who were the owners of the ship, for default in delivery of a large quantity of rye, which had been shipped at Taganrog, for Altona, by the *Earl of Dumfries*. The *Earl of Dumfries* was wrecked on the voyage off the coast of Portugal, and the jury, after a long inquiry, found that that was occasioned by the negligence of the defendants' master.

The questions raised on further consideration were with reference to the damages. They divided themselves into two heads: the one the actual loss of a portion of the rye, the other as to the expenses incurred in saving the remainder. I have to decide upon the principle; the amount under each head is to be settled by agreement out of Court.

With reference to the loss of the rye actually incurred, the defendants alleged that the plaintiffs were not entitled to recover at all, or, in any event, not beyond nominal damages, because they had sold the rye to one Lichtenstein, who, again, had sold it to Schütt & Co., of Berlin, the assignees of the bill of lading and the policy of insurance, and that, therefore, the property had passed out of the plaintiffs, and was vested in the vendees. The plaintiffs contended that they were trustees for others, and as the contract of sale from them to Lichtenstein and Schütt was at a fixed price "sound delivered," the risk of sound delivery was still the plaintiffs', and gave them an interest and right to sue. It will not become necessary to decide these points, as letters were produced from the vendee and the sub-vendee, authorising the plaintiffs to join them as plaintiffs, and I should do so if necessary.

The other question, as to the salvage expenses, arose in this way. The underwriters had, as was usual in such cases, employed the Salvage Association, with the assent of the defendants, the correspondence showing that the defendants gave instructions and were continually in communication with the Salvage Association, who sent out a steamship (the *Queensferry*) and rescued a large portion of the cargo, and, though the expenses were very heavy, there was a large margin of rye saved beyond what those expenses would amount to. Kroepin was Schütt's agent at Hamburg, and the defendants delivered through Slowman, their agent, to

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Kroeplin, the whole of the rye saved from the *Earl of Dumfries*. Before doing so they required and received from Kroeplin, through Slowman, a deposit of 50,000 marks, to answer general average and charges, under an agreement, undertaking to pay not only freight, but general average. The average statement was prepared by an average stater at Hamburg. The Salvage Association were paid their claim by the underwriters of the cargo, and the defendants deducted from the 50,000 marks the balance between the payment so made to the Salvage Association and the amount adjusted, and returned the residue to the plaintiffs through Slowman, and the defendants contended that as these expenses had not been paid by the plaintiffs, the plaintiffs could not recover.

It is clear that the remainder of the rye could not have been sent to its destination without these expenses, which were incurred in consequence of the defendants' master's negligence, and were for the benefit of the defendants. If the rye had been completely lost they would have been obliged to have paid the full amount of the loss to the plaintiffs, and if the plaintiffs had paid this money, they could have recovered it from the underwriters, and the underwriters, upon payment, would be subrogated into the rights of the insured, as against the defendants (*Dickenson v. Jardine*, L. R. 3 C. P. 639), and as the underwriters could recover from the defendants through the plaintiffs for the value of the goods lost, so they can for the amount of the salvage expenses paid.

The Salvage Association having a lien upon the salvage, could have compelled Schütt to pay them those expenses before delivery of the rye. Schütt, on payment, could have recovered that amount from the plaintiffs, and the plaintiffs could have recovered it from the underwriters, who could have sued the defendants in plaintiffs' name; and to avert this circuitry of payments, the sum was paid in the first instance by the underwriters of the cargo, to the Salvage Association, with the assent of all the parties.

It was further contended that, inasmuch as that amount had been paid under an agreement, it was a voluntary payment, and could not be recovered back. It is quite clear that that agreement was an arrangement merely to adjust the general average, and not the question of ultimate liability,

and was subject to the defendants' liability for the negligence of their captain ; and if the question of such liability had not been raised (as it would seem from the correspondence at that time not to have been), the money would have been paid under a mistake of fact, and so would be recoverable.

I am, therefore, of opinion that the plaintiffs are entitled to recover both for the rye actually lost and for the salvage expenses, and I give judgment for the plaintiffs, with costs, for the amount to be settled out of Court.

Walton, Bubbs, & Walton.

W. A. Crump & Son.

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WILLS, J.

SPEERS v. DAGGERS AND OTHERS.

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March 21.

THIS was an action tried at the Liverpool Winter Assizes, 1884, for damages for illegal seizure and sale of goods under an execution, upon a judgment of the Liverpool Court of Passage, and certain interpleader proceedings arising thereout.

The assessor of the Liverpool Court of Passage was authorised by Act of Parliament to make rules regulating the practice and

procedure of that Court. In December, 1876, he made the following rule :—

"The provisions of the Supreme Court of Judicature Acts, 1873, 1875, and such orders and rules made in pursuance thereof as are now in force, as well as any orders or rules which may hereafter be made and be in force for the time being by virtue of the said Act, shall" [with an immaterial exception] "extend and be applied to, and the forms therein contained shall be adopted in all actions, causes and matters which at or after the time of the coming into operation of these rules shall be within the cognizance of the Court of Passage of the borough of Liverpool, but so far only as such provisions, orders, rules and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the Court, the character of the parties, and the circumstances of the case may render necessary."

Held, that this rule did not give the Passage Court the jurisdiction in Interpleader contained in Order LVII., rule 8, of the Rules of the Supreme Court, 1883, and that even if it did give such a jurisdiction, the rule was in that respect *ultra vires*.

Semble. The above rule does not render the provisions of Order XIV. of the Rules of the Supreme Court, 1883, applicable to the Passage Court.

Officers of the Court are not protected in the case of process executed under an Interpleader Order made without jurisdiction, though good on the face of it, if such order was obtained on their own application.

The relief or remedy, the power to grant which is conferred on Inferior Courts by Sect. 89 of the Judicature Act, 1873, only refers to the relief and remedies to be administered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of execution, such as Interpleader.

The power to decide summarily without consent questions in Interpleader is not a "rule of law" within the meaning of Sect. 91 of the Judicature Act, 1873.

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The case was reserved for further consideration in London.
The facts fully appear from the judgment.

Dr. Commins and Lamb for the plaintiff.
Henn Collins, Q.C., and Walton, for defendant *Daggers*.
Little, for defendant *Stern*.

WILLS, J.—The plaintiff in this case sues three persons, *Daggers*, *Stern* and *Parker*, for various causes of action more or less connected with one another. He says that *Daggers* being the Sergeant-at-Mace of the Court of Passage in Liverpool, seized his goods on the 5th of September, 1884, under a writ of execution issued from that Court; that *Stern* and *Daggers* then caused *Parker* to sell them. He asserts that the execution was issued without jurisdiction, and was a nullity; and says that, even if good, the sale was for more than sufficient to cover the amount leviable under the execution; that he has had no account, and that the overplus has not been handed to him. He also complains that *Stern*, as the holder of a bill of sale over the same property, caused it to be sold before the expiration of five clear days from the day of seizure, contrary to the provisions of 45 & 46 Vict. c. 43, s. 13, and he makes a further claim against *Stern* for the detention of five scrips or certificates of an insurance society.

Before noticing in detail the defences set up, it is as well to eliminate certain matters which were disposed of by the verdict of the jury.

The jury found—and in my opinion most properly—that *Stern* had not authorized the sale; all that he had done was to receive the proceeds of sale from *Parker*. The jury found, and again I say with my entire concurrence, that the consideration for the bill of sale which was alleged to be untrue given in the bill of sale, was correctly stated. And this was the only objection raised to the bill, so that, as far as *Stern* was concerned, what happened was that *Parker* having sold goods which, under the bill of sale, were *Stern's*, and, having retained enough to pay out a distress under which he was in possession and the amount leviable under the execution from the Court of Passage, handed the residue of the proceeds to *Stern*. Out of the sum so handed to him, *Stern* was entitled under his bill of sale to retain all but 1*l.* 12*s.* 9*d.* He did, in fact, retain the whole—and did not render an account to the

plaintiff. He also failed to return the scrip or certificates referred to after his claims were satisfied, although he held them for the plaintiff, who admitted that Stern told him he might have them at any time if he would call for them, and it appeared that he would have had to walk about 100 yards to get them. The jury, under these circumstances, and again with my entire concurrence, assessed the damages for the detention at 1s. The judgment against Stern, therefore, must be for 1*l.* 12*s.* 9*d.* and 1*s.*, or 1*l.* 13*s.* 9*d.**

An application was made to me before the trial, upon a summons by the plaintiff to amend his statement of claim, that the defendant Stern might amend his defence by paying 1*s.* with costs, he having then returned the scrip. I granted his application, but inasmuch as no amendment was actually made, inasmuch as there must be judgment against Stern for something, and inasmuch as it was a case in which I think I ought to allow the plaintiff his costs on the High Court scale, I think it simplest to give judgment upon the pleadings as they stood before the application. There will be, therefore, judgment for the plaintiff for 1*l.* 13*s.* 9*d.* with costs upon the High Court scale against Stern in respect of so much of the action as claims an account, the return of the money due upon such an account, and of the insurance company's scrip or certificates, and for defendant Stern with costs upon the same scale in respect of the issues upon which he has succeeded.

This disposes of Stern's share in the matter, and I will now proceed to the much more serious questions involved in the rest of the action.

* I must here observe that my figures will not correspond with those found by the jury. The difference arises in this way :—There was a question whether under the bill of sale Stern was entitled to the high interest of 62 per cent. only up to the 31st July, or up to the 9th September, the date at which he received payment. I did not decide the question at the trial, and the case proceeded upon the footing that the right to that rate of interest ceased on the 31st

of July. And it was agreed that in that respect, and in some others in which the ultimate result in figures would depend upon my judgment upon the points raised, I should correct the figures upon which the verdict of the jury was based, as might be necessary. I am clearly of opinion that, under the bill of sale, the right to 62 per cent. continued until judgment, and I have corrected the figures taken *de bene esse* at the trial accordingly.

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It appears that one Hughes, having a claim for 20*l.* against the plaintiff, sued him in the Court of Passage, and took out a summons for judgment under Order XIV. of the Rules of the High Court. No cause was shown against this summons, and on the 27th of August, 1884, an order for judgment was made by the Deputy-Registrar, and on the same day judgment was signed. A writ of *fi. fa.*, dated the 1st of September, was delivered to the defendant Daggers, as the Sergeant-at-Mace of the Court of Passage, and he on the same day issued his warrant to the defendant Parker to levy the amount of the judgment with costs.

The execution was levied on the 2nd of September, by Parker. Whereupon the defendant Stern gave notice of his claim as the holder of the bill of sale before mentioned. Thereupon the defendant Daggers took out an interpleader summons, which was heard by the Deputy-Registrar on the 6th of September. The Deputy-Registrar endorsed the summons with the memorandum, "usual order for sale." Whereupon an order, dated the 6th of September, 1884, was drawn up and issued as "by the Court," whereby, upon hearing the solicitors for the execution creditor, and for the claimant, and for the officer of the Sergeant-at-Mace, and on reading certain affidavits, it was ordered that the officer to the Sergeant-at-Mace do proceed to sell enough of the goods and chattels seized under the writ of *fi. fa.* to satisfy the expenses of the said sale, the rent (if any) due, the claim of the said claimant, and this execution; and that out of the proceeds of sale, after deducting the expenses thereof, and rent (if any), the said officer to the said Sergeant-at-Mace do pay to the claimant the amount of his said claim, and to the said execution creditor the amount of his said execution, and the residue (if any) to the defendant. And it was further ordered that no action should be brought against the Sergeant-at-Mace. This order does not profess to be made by consent of the claimant Stern, nor was it in fact so made. On the contrary, his solicitor declined to be a party to it, and pointed out that it authorized a sale to satisfy his claim without the lapse of five days from the seizure under the bill of sale, and when in fact no such seizure had been made at all.

In pursuance of this order the defendant Parker sold the

whole of the plaintiff's goods. Out of the proceeds he paid the rent and the expenses of distress, the execution, and the costs of execution; he retained unlawfully as for expenses of execution, but in excess of his proper charges, the sum of 1*l.* 17*s.* 0*d.*; he handed over to the defendant Stern the sum of 70*l.*, and there remained in his hands as for the defendant, in the action the now plaintiff, the sum of 4*l.* 8*s.* 6*d.*, which he did not pay over to him, but ultimately paid into Court. Inasmuch as the order can in no case protect him for payment to Stern of sums to which Stern was not entitled, it follows from what has been said before that Parker is liable in any event to the plaintiff for the three sums of 1*l.* 17*s.* 0*d.*, 1*l.* 12*s.* 9*d.*, and 4*l.* 8*s.* 6*d.*, making a total of 7*l.* 18*s.* 3*d.* The jury have found that even if the interpleader order cannot be supported, the plaintiff has suffered only nominal damages so far as relates to the sums which went to satisfy the distress and to pay Stern; and they have found that in respect of the sale of more goods than were required to satisfy execution distress and bill of sale, the only damage the plaintiff has suffered is the price at which the surplus goods sold, viz., the above sum of 7*l.* 18*s.* 3*d.*, so that in effect the damages under this head are the same as those for withholding an account of the sale.

The position of the defendant Daggers is in this respect identical with that of Parker, so that unless they are liable for executing process issued without jurisdiction, the damages against them in respect of the matters already discussed will be 7*l.* 18*s.* 3*d.*, a sum which includes the 4*l.* 8*s.* 6*d.* paid into Court.

It was contended, however, that the defendants Daggers and Parker were liable for the seizure under the *fi. fa.*, inasmuch as, it was said, the Court of Passage had no power to grant judgment under Order XIV. However, Daggers acted under the writ of *fi. fa.*, and Parker under the warrant directed to him by the Sergeant-at-Mace, neither of which disclosed any want of jurisdiction or informality on the face of them; and the case of *Andrews v. Morris*, 1 Q. B. 1, is a conclusive authority that, although the judgment was that of an Inferior Court, they, as the ministerial officers of the Court, are protected by its process, whether supported by any valid judgment or not. So far, therefore, it is unneces-

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sary to inquire into the validity of the proceedings in the Court of Passage. There is, however, an issue as to the lawfulness of the sale for anything beyond the amount levied under the execution. The amount involved is very trivial, consisting of two sums of 1s. each, found by the jury as nominal damages (1) for selling the goods, necessary to satisfy the bill of sale, five days before they could have been sold by the bill of sale holder; (2) for selling the goods necessary to satisfy the distress under the process of the Court, instead of under the distress. The fate of this issue, however, will materially affect the costs, and as neither party was willing to give way with respect to even the shillings in question, and as the points raised are of great public importance, involving directly the validity of the proceedings in the Court of Passage, I have thought it necessary to deal with them as seriously as if large amounts depended upon my decision.

The two defendants who are affected by these questions justify the sale of the whole of the plaintiff's goods, and the payment out of the proceeds of the rent, and the sum due to the bill of sale holder, under the order made upon the interpleader summons, and say that they are liable to no damages for having acted under it. The position of the defendants justifying under the interpleader order is not the same as when they justify under the *fi. fa.* and warrant. Those are authorities which might lawfully be granted to them under a regular judgment. There is no doubt as to the jurisdiction of the Court to proceed by proper steps to judgment, and the ministerial officers of the Court have no means of knowing that the process or warrant under which they act is not backed by a regular and valid judgment.

It is contended for the plaintiff that the interpleader order is bad upon the face of it, and that even if it be good upon the face of it, the Sergeant-at-Mace and his officer interpleading are in the position of actors in litigation, putting in motion for their own benefit the process of the Court, and that they therefore cannot justify under process which they themselves have procured, however regular in form, if it be really issued by the Court without jurisdiction. I think this proposition is correct, and it is therefore necessary to see upon what authority the jurisdiction which has been exercised in the present instance rests. It is not alleged that there is

any ancient customary jurisdiction of the Court to grant relief of this kind, and the jurisdiction, if it exists, must be supported by statute, or by rules made under statutory authority.

It was urged for the defendants that, under the Liverpool Passage Court Act, 1853 (16 & 17 Vict. c. xxi. s. 70), the order in question can be supported; but it is plain that the power of the Court under that section to give relief by way of interpleader, is confined (except with consent) to ordering the trial of an issue, and to giving such directions as to costs and other matters incidental to the determination in that manner of the rival claims to the property seized as might be just and reasonable.

The defendants next relied upon Section 53 of the same Act, by which it is enacted as follows:—"In any case not provided for herein, or by the rules regulating the practice of the Court, the present principles of practice in the Superior Courts of Common Law at Westminster shall and may be adopted and applied to actions and proceedings in the said Court." I think it open to serious doubt whether, under these words, anything could be claimed as part of the practice of the Court of Passage which was not part of the existing law when the Act of 1853 was passed. But in any case what is applied is neither every provision which might then be found in the written rules of the Superior Courts at Westminster, nor by anticipation every change which might from time to time be introduced into those rules by Act of Parliament, or otherwise, but only those general principles which constitute the unwritten law embodied in the practice, and of which some of the written rules might afford examples or illustrations. At that date the power of granting relief by interpleader vested in the Superior Courts was that defined by the Statute 1 & 2 Will. IV. c. 58, ss. 1 and 6, the words of which are almost identical with those of Sections 67 and 70 of the Passage Court Act, 1853, a fact which of itself is a cogent proof that the general words of Section 53 were not intended to cover such a case as that of interpleader jurisdiction, since, if it were so intended, Section 70 was unnecessary.

In the present instance the jurisdiction of deciding an interpleader claim summarily without consent of parties and without ordering an issue was exercised by the Deputy

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Registrar of the Court of Passage. As this is not justified by any specific enactment, justification must be sought if it exist, in some of the rules made under statutory authority. The enactments under which powers are conferred upon the assessor of the Court to make rules touching the practice and pleadings of the Court of Passage are the general Act, 2 & 3 Vict. c. 27, s. 1; and the local Acts, 4 & 5 Will. IV. c. xcii. s. 4; and 16 & 17 Vict. c. xxi. ss. 52, 53, and 54. Under some of these enactments the rules to be made require the confirmation of one judge; under others that of three judges of the Superior Courts.

The only rule which has in fact been made under which it is argued that the jurisdiction in interpleader exercised in this case can be supported is one made by the learned assessor in Dec., 1876.

For reasons which will appear when I come to describe the nature and constitution of the Court of Passage, it is, I think, at least open to some doubt whether the assessor comes under the phrase "every judge of such Court" used in 2 & 3 Vict. c. 27, s. 1; but it is not worth while to discuss that question, inasmuch as there is no substantial difference between the powers conferred by the general and those given by the local Acts.

The rule in question is as follows :—

"The provisions of the Supreme Court of Judicature Acts, 1873, 1875, and such orders and rules made in pursuance thereof as are now in force, as well as any orders or rules which may hereafter be made and be in force for the time being by virtue of the said Acts shall" [with an immaterial exception] "extend and be applied to, and the forms therein contained shall be adopted in all actions, causes and matters which at or after the time of the coming into operation of these rules shall be within the cognizance of the Court of Passage of the borough of Liverpool, but so far only as such provisions, orders, rules and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the Court, the character of the parties, and the circumstances of the case may render necessary."

Now I have to observe at the outset that such a method of establishing a code of practice for the Court of Passage appears to me to be eminently unsatisfactory. Not a single

definite rule of practice is laid down for the guidance of the practitioner, or of the judicial authority, but he is left to pick out for himself as best he can the portions of two Acts of Parliament and one or more sets of rules long enough to fill a thick octavo volume, which in his opinion may be applicable to the Court of Passage. In so doing he has to settle for himself whether existing rules are, in each case, repealed, modified or left unaltered by the new provisions adopted, at the risk of all the pecuniary loss and other disadvantages which may ensue if the judicial authority which is to administer the new rules should differ from him as to the solution of what may well be a difficult and complicated legal puzzle. The full measure of the difficulty involved I proceed to point out.

The Judicature Acts relate to establishing the constitution and powers of the Supreme Court. The rules made under them are the Rules of the Supreme Court, and regulate its practice. The Supreme Court consists of two branches—the High Court and the Court of Appeal. By one of these Acts, with certain exceptions defined by the rules, every order made by a master is subject to appeal to a judge, from whom an appeal lies to the Divisional Court, from which again there is a resort to the Court of Appeal, and finally from that Court to the House of Lords. In some cases of exceptional difficulty or importance recourse must be had in the first instance to the Court (that is the Divisional Court) or a judge. In the Court of Passage, on the other hand, there is no person answering in any degree to a judge of the High Court. Prior to 1834 the mayor and two bailiffs were the judges. By an Act of 1834 the mayor and one bailiff, or the mayor alone, or two bailiffs, might hold the Court, but could not sit for the trial of causes or the hearing of what are called in the Acts of Parliament (though nowhere defined) “special arguments” without the presence of an assistant barrister, for whose appointment provision was made (4 & 5 Will. IV. c. xcii. ss. 1 and 2). By an Act of 1836, two aldermen may preside at the Court in place of the mayor, and the assistant barrister (therein and thenceforward styled the assessor) may hold Courts for certain specified purposes without the presence of any of the local authorities (6 & 7 Will. IV. c. cxxxv. s. 8); but the Court is to be the Court of the Mayor (sect. 2); and the assessor has never yet in any

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Act relating to the Court of Passage been styled the judge of the Court, nor does he exercise any functions in chambers, either by way of original jurisdiction or of appeal, or possess any powers beyond those specifically conferred upon him by statute. The judicial authority in chambers is vested in the Registrar and Deputy Registrar of the Court. The Town Clerk is by virtue of his office Registrar, but the jurisdiction is, in fact, exercised by the Deputy Registrar, or person appointed by him, and not required by any statute or provision of the law to possess any legal qualification whatever. An appeal lies from him to the Registrar, but not to the Assessor, and there is no appeal beyond that to the Registrar or Town Clerk. It is, to say the least, a good deal to expect of the litigant or his adviser, or of the Deputy Registrar, to pick out of the rules made with reference to a system so essentially different those parts which can fairly be said to be applicable to a Court so constituted. By the Rules of 1883 many things are to be done by a master, many by a judge, many by the Divisional Court. What "master" is there in the Court of Passage to do them? Who is the "judge"? Is he the assessor, who has no function analogous to those in question? or the mayor, or the bailiffs, or the aldermen, who have no judicial functions beyond the right of presiding on certain occasions at the public sitting of the Court? What is "the Court" answering to the Divisional Court? The difficulty was met by certain specific provisions in the Passage Court Act, 1853, ss. 72 and 73, in relation to the adopted portions of the Common Law Procedure Act, 1852, and in the Order in Council of 27th November, 1854, in relation to the adopted portions of the Common Law Procedure Act, 1854; but in the Rules of December, 1876, the only attempt to indicate that in the appropriated enactments and rules "master," "judge," and "Court" are to have any meaning is contained in a Rule (6) of great length, which it is, perhaps, unnecessary to read *in extenso*, but which, from its want of definitions, is but little calculated to diminish the difficulty of the problem. There is certainly good ground for the complaint of the defendants that such a method of establishing a code of practice in proportion to the facility of the process imposes an unreasonable and improper burden upon the suitor. The reasonable course would appear to be

that which has been followed in all previous instances of rules made by the assessor, viz., to state in terms the rules intended to be laid down, and by which the parties are to be guided, so that a person having occasion to resort to the Court may have definite information to what regulations he has to conform.

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Passing from this general topic, it is to be observed that the rule in question is divisible into two parts: 1. An adoption of practice and procedure already comprehended in the Acts of 1873 and 1875, and the rules contained in the Schedule to the latter Act; 2. An adoption by anticipation of such modification of that practice and procedure as should be effected by future rules. It is the latter part of the rule that is material in the present case, for at the time it was promulgated the jurisdiction of the judges of the Superior Courts to decide interpleader claims without a jury and without consent of parties depended, not upon the Judicature Acts of 1873 and 1875, nor upon any rule made thereunder, but upon the provisions of the Common Law Procedure Act, 1860. There *was* a method by which that Act or any suitable portions of it might have been adopted, viz., by Order in Council made under Section 44 of that Act, but this course has not been taken. The jurisdiction in question, therefore, must be supported, if it can be done at all, by the proposed adoption *in futuro* of whatever rules might be made under the power of the Acts of 1873 and 1875 for the regulation of the Supreme Court. If that can be done, the appropriated portions of the Rules of 1883 are applied, and it would then be necessary to consider whether the Order of 1883 relating to interpleader can be considered "applicable" to the Court of Passage. The Acts, however, under which rules are to be made for the Court of Passage confer the power of making them upon the *assessor*. The mental act—the exercise of judgment and volition involved—is to be *his*; what he has *done* is to delegate it absolutely and in its entirety to individuals of a certain class, and to adopt beforehand whatever *they* may enact with respect to the practice of the Supreme Court. Such a process cannot possibly be a compliance with the Act empowering the assessor to make rules, and it is nothing to the purpose to argue, as was done for the defendants, that the persons to whom the power is delegated are of a class presumably com-

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petent. It is true that the rules have been allowed by three judges, and certainly no one is more disposed than myself to pay respectful attention to the fact, or to the three names which appear at the foot of the rules. But such allowance cannot validate that which is *ultra vires* of the assessor, and the proposition I have laid down seems to me too obvious for serious controversy. It is probable that such a method of legislating for future practice was suggested by the language of one of the rules framed by Mr. Crompton when he was assessor of the Court in 1844, whereby it was provided that "the practice, where no rules and orders apply to the contrary, shall be as nearly conformable as may be to the rules and practice of the Superior Courts at Westminster, as the same now are or hereafter may be made and altered," and a rule in the same terms made in 1853 by his distinguished successor, Mr. Edward James. Such rules, however, point to the general principles of practice, and amount to very much the same thing as the provisions of Section 53 of the Court of Passage Procedure Act, 1853. And they appear to me to afford no precedent or warrant for the rule now under consideration. I have further to observe that the proposal to adopt such portions of the Rules of the Supreme Court as should be fairly applicable to the Court of Passage, although open to the objection I have pointed out as well as to some others with which I shall presently deal, had nothing unreasonable on the face of it; and it would have needed a mind more than ordinarily suspicious to anticipate the usurpations of jurisdiction which have been effected under colour of such a provision, usurpations probably not contemplated, either by the learned assessor who framed the rule under discussion, and whose position in the Court is anomalous, being in no sense that of a judge having the general care of its proceedings and control of its officers, but merely that of a person exercising certain statutory jurisdiction at the public sittings of the Court, and to whom no appeal lies from the Deputy Registrar or Registrar, however erroneous the assumption of jurisdiction or exercise of authority by either or both of those officers. The proposed adoption of rules to be made *in futuro* is in terms confined to rules to be made under the Judicature Acts of 1873 and 1875. But the Rules or Orders of 1883 are not made under the authority of those Acts alone,

nor in the manner provided for by those Acts under which they would have been made by Order in Council (Judicature Act, 1875, s. 17). They *were* made under the powers of the Appellate Jurisdiction Act, 1876, s. 17, and the Judicature Act, 1881, s. 19. So that even the rule of the Passage Court of 1876, as it stands, will not cover what has been done. Supposing, however, that such a mode of applying future legislation and regulation could be supported, and that the language used would include the rule of the Supreme Court in question. It is, I think, clear that under a power to regulate practice the assessor cannot create a new jurisdiction. The Common Law Courts had, prior to 1860, ample powers of making rules to regulate practice (see 11 Geo. IV. & 1 Will. IV. c. 70, s. 11, which was not repealed until 1879 (42 & 43 Vict. c. 59, s. 2)); but it never occurred to the eminent judges who signed the Third Report of the Common Law Procedure Commission (Cockburn, C.J., Martin, B., Willes, J., and Bramwell, B.) to suppose that the changes in interpleader jurisdiction affected to be wrought for the Court of Passage by the Order of 22nd December, 1876, could be introduced by Rules of Court.

The Commissioners pointed out that the existing jurisdiction was imperfect, and recommended that the changes they suggested (which made the system identical with that adopted by the Rules of the Supreme Court of 1883) should be carried out by an Act of Parliament, and they were accordingly embodied in the Common Law Procedure Act, 1860. If, however, these formidable difficulties could be surmounted, I think there is a further objection to what has been done. The prospective adoption of the Rules of 1883, alleged to be effected by the Passage Court Rules of 1876, professes to extend so far only as such rules may be applicable to the Court of Passage. I have already pointed out the general objections to such a method of framing rules of practice, on the ground of its embarrassing and indefinite character. The special matter now under consideration affords a strong illustration of its objectionable nature, and of the serious mistakes which were almost certain to flow from an attempt to put in practice a rule of the kind. The Rules of the Supreme Court deal with a system a part of which is the power of appeal from the master. It is true that by

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Order LVIII., Rule 8, the power of appeal in cases like the present is limited by the necessity of obtaining leave to appeal. But such an appeal is possible, and appeals from the master to the judge in matters of interpleader are not uncommon. In the Court of Passage no such appeal is possible. The assessor is the assessor, and not the judge of the Court, and from the Deputy-Registrar the only appeal that lies is one rarely if ever resorted to in practice, to the Town Clerk of Liverpool. I believe there is some doubt whether there is not also a theoretical appeal to the Mayor; but for all practical purposes such an appeal may be discarded as an element in the discussion. I can understand that a rule which provides, for instance, that a statement of defence shall be delivered within so many days, may be just as applicable to the Court of Passage as to the Supreme Court; but when we are dealing with the exercise of important judicial powers, it seems to me that the Rules of the Supreme Court, into all of which must be read the statutory addition that, unless otherwise provided for, every order of a Master is subject to appeals, even up to the House of Lords, cannot be considered as applicable to a Court where no single appeal can be had, answering in any way even to those provided within the Supreme Court itself (apart from any appeal to the House of Lords). If I am right, the interpleader order made in this case was made without jurisdiction. Were it even made under the power of Order LVII., Rule 8, of the Rules of the Supreme Court of 1883, it is bad. Being the order of an Inferior Court it ought to show on the face of it the elements of jurisdiction. It does not state that the execution was levied within the jurisdiction of the Court, nor that the parties consented to the exercise of summary jurisdiction, nor that the jurisdiction had been exercised at the request of the claimant, and that it had seemed desirable to the Deputy-Registrar, having regard to the value of the subject-matter in dispute, to exercise it, and, therefore, even if the officers of the Court were, as in the case of the *fi. fa.*, acting ministerially under it, instead of invoking the non-existent jurisdiction for their own benefit, they would not be protected by such an order. It was urged that they were in the further difficulty that the judgment which was the foundation of the proceedings in interpleader was void, inas-

much as the adoption of Order XIV. of the rules forming the schedule of the Judicature Act, 1875, was open to many of the fatal objections which I have indicated in the case of the interpleader proceedings. I doubt, however, the validity of this objection.

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The foundation of the relief by interpleader is Section 70 of the local Act of 1853, and it is given "when any claim shall be made to or in respect of any goods or chattels taken in execution under the process of the Court." If the officers have *de facto* executed process under a regular warrant, they will, I think, come within the terms of the enactment; and if the procedure of that section were capable of modification in the way suggested, and the prospective adoption of the Rules of 1883 could give the jurisdiction which has been exercised, I doubt very much if the officers would lose the benefit of the remedy simply because the judgment levied was a void one. But it is not necessary to decide that question, and if I refer to it at all it is only to point out the gravity of the usurpation hitherto successfully attempted by the Court of Passage, and its serious consequences to persons affected by it. In the High Court an erroneous order for judgment under Order XIV. may be, and before now has been, carried up to the House of Lords (*Wallingford v. The Mutual Society*, L. R. 5 App. Ca. 685). In the Court of Passage, whose jurisdiction, though circumscribed as to locality, is unlimited in amount, judgment might be signed for 20,000*l.*, if the contention of the defendants be correct, on the order of a person not necessarily a lawyer, subject only to an appeal to the Town Clerk of Liverpool. Such a result seems a *ne plus ultra* of legal anomaly, needing only to be stated to raise the strongest presumption that it cannot be the law. It was argued that the interpleader order might be justified under Section 89 of the Judicature Act, 1873 (36 & 37 Vict. c. 66), but in that section the words "in every such proceeding" are to be read as equivalent to "in every such action" (*Prior v. The City Offices Company*, L. R. 10 Q. B. D. 504), and it is, I think, clear that the power given by that section (supposing the Court of Passage to answer the description of a Court having jurisdiction at law and in equity), to give relief, &c., in as ample a manner as would be done in the like case by the High Court, refers to the relief and remedies to be adminis-

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tered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of execution, such as interpleader. It was also argued that under Section 91 of the same Act the proceedings in interpleader might be supported. But the enactment which conferred the jurisdiction in question on the Supreme Courts did not lay down "rules of law;" they merely granted a new and easier remedy, so that the proceedings in question cannot be described as a rule of law; and if it could, it was the creature not of the Judicature Acts either of 1873 or 1875 (which are to be read as one), or of the schedule to the latter Act, but of the Common Law Procedure Act, 1860; so that it cannot possibly be covered by the language of Section 91. I have come, therefore, to the conclusion that the jurisdiction exercised by the Court of Passage in this case is *ultra vires*, both as to the judgment under Order XIV. and as to the interpleader order. Such extended powers as it may be desirable to confer on the Court of Passage, and such improvements in its practice compatible with that uncontrolled exercise of judicial power by an inferior officer of the Court, which is a part of its constitution, are attainable by proper means. By 46 & 47 Vict. c. 49, s. 8, a power analogous to that conferred by the Common Law Procedure Acts of 1852, 1854, and 1860, was given to Her Majesty in Council, to extend to any Inferior Court any of the provisions of the Judicature Acts or of the Rules of the Supreme Court, with such modifications as might be necessary; and by 47 & 48 Vict. c. 60, s. 24, ample powers are vested in what is generally known as the Rule Committee of the Supreme Court (see 44 & 45 Vict. c. 60, s. 19) of giving effect to any proper rules which may be made by the judge, or assessor, or other officer of an Inferior Court having by law authority to make them. But new and formidable jurisdiction certainly cannot be conferred by the means which, as the present case discloses, have been hitherto adopted in the Court of Passage.

My judgment, therefore, is for the plaintiff, for 1*l* 18*s*. 9*d*., as against Stern, with costs on the High Court scale, subject, however, to the special direction above mentioned as to the costs of certain issues; for 8*l*. 1*s*. 9*d*. (beyond the sum paid into Court) as against Daggers and Parker, with costs likewise on the High Court scale; and, in order to entitle him to such

costs, I shall certify on the record that there was sufficient reason for bringing the action in the High Court, and the plaintiff will also have his costs of the counter claim.

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S. Green.

Tyrer & Co.

Quilliam.

CAVE, J.

BEAN v. WADE AND OTHERS.

1885.
April 14.

THIS was an action by the trustees of a marriage settlement, to recover damages for negligence against the defendants, three solicitors.

As against one of the defendants, George Wade, the question arose whether the claim was not barred by the Statute of Limitations. On this point the material facts were as follows:—

The defendants were employed to act as solicitors in a suit instituted in Chancery on April 2nd, 1874, in which Mrs. J. G. Bean, by her next friend, was plaintiff, and one Cooper and Mr. J. G. Bean were defendants. The object of the suit was the removal of Cooper from his post of trustee under the marriage settlement of Mr. and Mrs. J. G. Bean, and the appointment of new trustees. Part of the property comprised in the settlement consisted of a reversionary interest of J. G. Bean, in certain personal estate, under the will of one Elizabeth Whittingstall. In the Chancery suit, a decree was made removing Cooper from his post of trustee, and appointing the plaintiffs the new trustees. By indenture of the 28th of June, 1875, Cooper conveyed and assigned to the new trustees the property comprised in the settlement. The defendants gave no notice to the trustees of the will of Miss Whittingstall of the appointment of the new trustees of the marriage settlement, nor of the assignment to them of the trust property, nor did they advise the plaintiffs of the necessity of giving such notices. Such notices were not in fact given.

On February 27th, 1879, J. G. Bean mortgaged his reversionary interest under the will of Miss Whittingstall, to one Burgess, to secure £800; and on April 8th, 1879, Burgess

Trust property was transferred to new trustees in July 1875. The solicitor employed in the transaction did not give certain notices necessary to perfect the title of the new trustees; and in April 1879 a subsequent mortgagee of the property obtained priority over the trustees by giving notice of his charge. *Held*, that there was no complete cause of action against the solicitor in respect of his negligence till April 1879, from which date the Statute of Limitations therefore ran.

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gave notice of his mortgage to the trustees of the will, and thereby (as was decided in an action before Vice-Chancellor Hall) gained priority over the plaintiffs.

This action was commenced in the year 1884.

Jelf, Q.C., and *Sills*, for the plaintiffs.

L. Smith, Q.C., and *Danckwertz*, for the defendants.

The following cases were cited :—*Howell v. Young*, 5 B. & C., 259; *Smith v. Fox*, 6 Hare, 386; *Bonomi v. Backhouse*, 9 H. L. C. 508; *Stanford v. Roberts*, 32 W. R. 404.

CAVE, J.—The question as to the liability of George Wade is a very difficult one; there is no authority in point, and the cases cited are inapplicable, as in all of them it was easy to say *when* there was an act of negligence. When was there a completed act of negligence in this case? Clearly not on the 29th of July, 1875. A reasonable time must be given, and what would be a reasonable time varies according to the circumstances of each case. Now, on April 8th, 1879, Burgess gave notice; and at that time I think it clear that there was negligence. No doubt it seems illogical to say that the question whether or not there is negligence can be governed by the result; but still, it is a question of fact, and, so treating it, I cannot say there was any completed act of negligence on the part of George Wade before the 8th of April, 1879. He is therefore not protected by the Statute of Limitations.

Frederic Taylor.

Hare & Co.

“The gist of an action for negligence seems to me to be the harm to person or property negligently perpetrated. In a certain class of cases the mere violation of a legal right imports a damage. ‘Actual perceptible damage,’ says Parke, B., in *Embrey v. Owen*, 6 Exch. 368, ‘is not indispensable as the foundation of an action; it is sufficient to show the violation of a right, in which case the law will presume damage;’ but this principle is not as a rule applicable to actions for negligence: which are not brought to establish a bare right, but to recover compensation for substantial injury. ‘Generally speaking,’ says Littledale, J., in *Williams v. Morland*, 2 B. & C. 916, ‘there must be temporal loss or damage accruing from the wrongful act of another in order to entitle a party to maintain an action on the case;’ see *Fay v. Prentice*, 1 C. B. 835, per Maule, J.” Per Bowen, L.J., in *Brunsdon v. Humphrey*, L. R. 14 Q. B. D. at p. 150. See too *Ashby v. White*, 1 S. L. C., p. 312, 8th edit.

DAY, J.

WELLS v. THE MASONS' COMPANY OF THE CITY
OF LONDON.1885.
April 16.

THIS was an action of mandamus to the master, wardens and assistants of the defendant company, to compel them to proceed to elect eleven assistants, so as to bring up the number of assistants to twenty-four.

The defendant company was constituted by charter of Charles II. in the year 1679. The material parts of the charter were as follows :—

“ And further, we will and ordain, and by these presents for us, our heirs and successors, do give and grant unto the said master, wardens, assistants, and commonalty of the Company of Masons of the City of London, and to their successors, for ever, that for ever hereafter there shall be some one of the said company, in manner and form hereunder in these presents mentioned, to be chosen and named, who shall be and shall be called the Master of the said Company of Masons of the said City of London. And likewise that there shall be, and may be, two of the said company and corporation, in manner and form hereafter in these presents mentioned, to be chosen and named, who shall be and shall be called the Wardens of the Company of Masons of the City of London. And also that there shall or may be four-and-twenty or more of the said company, according to the discretion of the master and wardens for the time being, in manner and form hereafter in these presents expressed, to be named and chosen, which shall be and shall be called the Assistants of the said Company of Masons of the City of London, and from time to time shall be assisting and aiding to the said master and wardens of the said company. And that the said master, wardens, assistants, and commonalty of the said Company of Masons of the City of London for the time being, or any eight or more of them, whereof the master and one of the wardens for the time being, to be always two, shall and may have full power and authority, by virtue of these presents, to make, constitute, ordain, and set down from time to time, and also from time to time to alter, change, amend, and make new such reasonable laws, acts, orders, ordinances, and consti-

The charter of a Corporation created for the purpose of regulating the trade of masonry in and about the City of London provided that “ there shall or may be four-and-twenty or more of the said company, according to the discretion of the Master and Wardens for the time being, in manner and form hereafter in these presents expressed, to be named and chosen, which shall be and shall be called the assistants; ” and in case of vacancies in the post of assistant, the charter provided that “ then and so often it shall and may be lawful to and for the Master and Wardens, and the remaining part of the assistants which shall then survive or remain, or any eight of them at their wills and pleasures from time to time to choose and name one or more, other or others of the said company, to be assistant or assistants, ” &c. *Held*, that it was obligatory on the Corporation to always have at least twenty-four assistants.

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tutions in writing, which to them, or any eight or more of them as aforesaid, whereof the master and one of the wardens for the time being, to be two, shall seem good, necessary, and expedient, and according to their best discretions, for touching and concerning the improvement of the said trade, art, or mystery of masons, and the good order, rule, and government of the said company and corporation, and every member thereof, and for punishment and reformation of such abuses, deceits, falsities, and other wrongful practices and misdemeanours from time to time to be committed, used, or practised in their trade, or in anything appertaining or in any wise belonging to the art or mystery of masons, whereby our loving subjects may be wronged, damnified, or abused, or any other wrong cozenage or deceit or abuse, offered or used in the said trade, at any time whatsoever, within the said Cities of London and Westminster, and the liberties thereof, or within any other place or places within the limits aforesaid. . . .

* * * * *

“ And moreover, we will and by these presents, for us, our heirs and successors, do give and grant unto the said master, wardens, assistants, and commonalty of the Company of Masons of the City of London, and to their successors, that whenever it shall happen any one of the assistants of the said company and corporation to die or be removed from his or their office or offices, all which assistants and every or any of them we will shall be removeable and removed by the greater part of the said master, wardens, and assistants of the said company and corporation for the time being, whereof the master and one of the wardens for the time being, to be always two, for evil government and misbehaviour, or for any other lawful and reasonable cause.—That then and so often it shall and may be lawful to and for the master, wardens, and the remaining part of the assistants which shall then survive or remain, or any eight of them (whereof the master and one of the wardens for the time being to be always two), at their wills and pleasures, from time to time to choose and name one or more other or others of the said company or corporation to be assistant or assistants of the same company or corporation in his or their place or stead, which shall so happen to die or be removed as is aforesaid.”

The number of assistants had since 1822 been always con-

siderably less than twenty-four. Since that time, on more than thirty occasions, there had not been the requisite quorum for the transaction of business, and the business had been done without a quorum.

In 1844, a sum of 50*l.* was set apart as a reward to the master, wardens, and assistants attending the business meetings of the company; and in 1861, a sum of 5*l.*, annually, to be divided among those who were punctual in their attendance at such a meeting.

It was admitted that the company had long ceased to exercise any public functions.

Matthews, Q.C., Cohen, Q.C., and B. Firth, for the plaintiffs.

Charles, Q.C., and C. Gould, for the defendants, contended that there was no obligation on the company to elect more assistants than were necessary to form a quorum. There were now no public interests to be served by their doing so. They cited *Rex v. Chester*, 1 M. & S. 101; *Rex v. Fowey*, 2 B. & C. 584; *Julius v. Bishop of Oxford*, L. R. 5 App. Case 214.

DAY, J.—A mandamus is asked for to order the defendant company to proceed to the election of eleven assistants, in order that there may be twenty-four assistants. The company was incorporated in the reign of Charles II., to regulate the trade of masonry in and near London, and there can be no doubt that at that time the company was intended to exercise, and did exercise, important public functions, and regulated the trade of masonry, by inspecting stone work, and otherwise. This was the gist and object of the incorporation of the company, and by this light I proceed to construe the charter. “There shall or may be four-and-twenty or more.” I construe these words as meaning there shall be twenty-four, or there may be more. This construction gives all the words a clear plain meaning. “According to the discretion of the master and wardens.” That means that they are to exercise their discretion as to whether there shall be more than twenty-four. Then we have the words: “It shall and may be lawful, &c., &c., at their wills and pleasures, from time to time, &c., &c.” I do not think these words present any difficulty, nor that the cases cited have any bearing on the matter.

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They are to choose whomsoever they like from time to time, as vacancies occur; but it is imperative that there should be at least twenty-four assistants in all. The same words, "it shall be lawful," are used when the election of the master and wardens is referred to. There the words must be imperative. Why should they be less imperative when the election of the assistants is being considered? It is true this company has now no public duties to perform; from these they have been relieved; but this can in no way affect the construction of the charter. It must be construed now just as it would have been construed at the time the charter was made; and at that time it was of the first importance that the company should be to some extent a representative body. It is immaterial, therefore, to consider whether twenty-four assistants are now necessary or not. Still, the difficulty there is in getting a quorum with their present numbers would rather lead me to say that even for their present business there should be twenty-four assistants, in order to secure a quorum.

*Hunters, Gwatkin, &
Haynes.*

Keighley, Shea, & Beran.

LOPES, J.

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April 18.

PHELPS & WOODFORD v. UPTON SNODSBURY
HIGHWAY BOARD.

A retainer of a solicitor by a Highway Board to oppose a bill in Parliament prejudicially affecting the district must be under seal: if it be not under seal, the solicitor cannot recover any expenses incurred by him in opposing the bill.

THIS was an action by solicitors to recover a sum of 84*l.* 2*s.* 7*d.* for work done and money expended as solicitors. The main defence was that the plaintiffs' retainer was not under seal, and so the contract was not enforceable.

In the year 1882 a bill was before Parliament for the promotion of a railway company to be called "The Worcester and Broom Railway Company." The projected railway would have passed through the district of the defendant Board, and was considered likely to prejudicially affect the highways by the erection of the bridges, and the alteration of the levels thereby occasioned. The last day for presenting a

petition to the House of Commons against the bill was the 25th of February, 1882: on the 18th of February, 1882, the defendant Board by resolution authorized their clerk to take the necessary steps for procuring a petition to be presented against the bill on behalf of the defendants. The clerk accordingly on February 20th instructed the plaintiffs to take these necessary steps, and the plaintiffs did so, and incurred expense by employing a parliamentary agent and otherwise. The bill was subsequently abandoned. There was no retainer under seal.

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Finlay, Q.C., and *English Harrison*, for the plaintiffs, contended that affixing the seal of the Board was unnecessary in this case because—(1) The opposing the bill in Parliament was, under the circumstances, a thing incidental to the purpose for which the Board was created. (2) The time for presenting the petition was so short that it was a matter of urgent necessity, and it would not have been right to lose time by going through forms. (3) The work had been done, and the defendants had had the benefits of its performance. They cited *Church v. Imperial Gas Light and Coke Company*, 6 A. & E. 846; *Haigh v. Guardians of North Bierley Union*, E. B. & E. 873; *Scott v. Clifton School Board*, L. R. 14 Q. B. D. 500.

Bosanquet, Q.C., and *Amphlett*, relied on *Arnold v. Mayor of Poole*, 4 M. & G. 860; 5 Scott, N. R. 741; and *Hunt v. Wimbledon Local Board*, L. R. 4 C. P. D. 98; and *Sutton v. The Spectacle Makers' Company*, 10 L. T. N. S. 411.

LOPES, J. (after stating the facts).—The question is whether it was necessary that the common seal of the defendant Board should have been affixed to the retainer of the plaintiffs: and I think that it was necessary. I rest my decision on the case of *Hunt v. Wimbledon Local Board*. The expressions of the Judges in that case have a very direct bearing on this case. Cotton, L.J., says:—"First I shall deal with the question as if there had been nothing special in the Act of Parliament as to the contract entered into by the Local Board in this case. The common law being that a corporation cannot bind itself by contract except under seal, there are certain exceptions to that rule. There is one exception that,

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for the purpose of carrying out the ordinary business for which the corporation has been formed, it has power to bind itself without a contract under seal. But that is only in small matters necessary for the ordinary business of the corporation. There are, however, reasons why that cannot apply to this case, so as to bring the matter within such an exception. But it is urged that there is another exception, namely, that corporations are liable when goods have been supplied or work done in pursuance of a contract entered into not under seal, and the corporation have had the full benefit of such contract. I entertain very grave doubts whether such a corporation as this could be bound on any such ground, because the parties who have a beneficial enjoyment of anything supplied on the order of this body are not the corporation, but those for whom the corporation act as trustees. I cannot see that the principle can apply to a corporation constituted as this is, existing not for its own benefit, or for doing that from which it can derive any benefit, but as trustees for a certain portion of the public." These observations are very applicable in this case: for the defendants have themselves no benefit from the contract, but are trustees for the ratepayers: nor is the other exception applicable, for I do not think the work done in this case can be said to be incidental to the ordinary business of the defendants. The case, therefore, not falling within the exceptions to the general rule, the general rule must be applied, and judgment be given for the defendants.

Phelps, Woodford & Co.

Smiles & Co.

DAY, J.

THE BUXTON AND HIGH PEAK PUBLISHING AND
GENERAL PRINTING COMPANY *v.* MITCHELL.

1885.

April 20.

THIS was an action to restrain the defendant from editing, printing or publishing within the parliamentary district of North Derbyshire a newspaper called the "Derbyshire Post." The defendant had been the proprietor and editor of a newspaper called the "High Peak News," which paper was published at Bakewell and circulated largely in the north of Derbyshire.

If a bankrupt join with his trustee in selling the goodwill and business previously carried on by the bankrupt, and agrees with the purchaser not to carry on a similar business within a prescribed district, such agreement is binding on him, and he can be restrained from so doing.

In 1877 the defendant became bankrupt, and his trustee in bankruptcy, by an agreement made on the 9th of April, 1878, sold the "High Peak News" to the plaintiffs. The defendant was a party to and signed this agreement, which contained the following provision :—

"And the said Robert B. Mitchell agrees that he will not at any time after the said transfer carry on the business of a printer, publisher or editor of any newspaper or periodical, or connect himself with any partner or partners, or carry on the said businesses or any of them within the present parliamentary district of North Derbyshire, commonly called the Northern Division of Derbyshire, except (if his services should be accepted) as the employé of the said company, without the written consent of the company."

In April, 1884, the defendant began to publish the "Derbyshire Post" within the Northern Division of Derbyshire.

The defendant gave evidence to the effect that he at first absolutely refused to sign the agreement, but that the trustee said that if he did not do so, the creditors would certainly take care that he did not get any discharge in the bankruptcy; that he (the defendant) would be compelled by the Judge to sign the agreement; that the plaintiff company knew all these circumstances; and that he signed solely because of the pressure thus put upon him.

E. S. Ford, for the plaintiffs.

Cyril Dodd, for the defendant, contended that, so far as the

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defendant was concerned, there was no consideration for the agreement, and therefore it was not binding on him. He was under no obligation to sign it, could not have been ordered to do so, and if he had not, there would have been nothing to prevent him starting a fresh newspaper, notwithstanding the sale of the old one by the trustee. (*Walker v. Mottram*, L. R. 19 Ch. D. 356.) He further contended that the agreement was illegal, as being in restraint of trade: and that the defendant's signature to it was obtained by pressure and duress.

DAY, J.—I am clear about this case. The first ground on which the defendant seeks to be released from his promise, is that there was no consideration for it. But there is abundant consideration; for it was on the faith of the defendant's promise that the plaintiffs bought and paid for the newspaper. This payment was a good consideration for the defendant's promise: that the payment was not made to the defendant is quite immaterial.

Next, it is said that the clause is illegal, because it is in restraint of trade. But I do not think so at all. If the defendant himself had sold his newspaper to the plaintiffs, such a clause would have been most proper and reasonable. Then why does it become unreasonable, because the defendant very properly joined with the trustee to enable the newspaper to be sold as advantageously as it could have been sold, if the defendant had been able to sell it himself?

Lastly, it is argued that defendant had signed the agreement under pressure. Well, in a sense, there might have been pressure; for, unfortunately, bankrupts do not always feel it their duty to assist, of their own motion, in the realization of their estate for the benefit of their creditors, and require to be pressed to do so. But pressure, in the sense of legal pressure or duress, I think there was none.

F. Venn & Co.

E. Doyle & Sons.

CAVE, J.

1885.

April 21.

WILLIAMS, DEACON & CO. v. SHADBOLT.

THIS was an action on bills of exchange by indorsees against the acceptors.

The Dana Land and Lumber Company carried on business in Mobile, Alabama, United States, and consigned timber from time to time to the defendants, timber merchants and agents in London. The course of business was for the Dana Company to draw on the defendants from time to time, not against particular shipments, but for amounts regulated by the quantity of timber in course of shipment. These drafts the Dana Company used to discount with the Bank of Mobile, at Mobile; and the Bank of Mobile forwarded them to the plaintiffs in London endorsed restrictively in the manner the bill hereinafter set out was endorsed. The plaintiffs on re-receiving the draft would take it to the defendants for acceptance, and the plaintiffs thereupon credited the Mobile Bank with the amount of the draft, and allowed them to draw on them at once against the amount so credited. The acceptances would then, in the ordinary course, be paid by the defendants to the plaintiffs at maturity. The defendants were not aware that the plaintiffs used to allow the Bank of Mobile to draw against the amount of the acceptances before maturity.

In pursuance of the above course of business the Dana Company drew bills upon the defendants in a form of which the following is a sample:—

“Sixty days after sight of this first of exchange (second and third unpaid) pay to the order of ourselves 1,600*l*. sterling value received, and charge the same to account of as advised.

“Dana Land and Lumber Company.

“To Messrs. Geo. Shadbolt & Son, London.”

This draft with others was discounted by the Dana Company with the Bank of Mobile, and endorsed to the Bank. The Bank endorsed the drafts to the plaintiffs as follows:—

“Pay to the order of Messrs. Williams, Deacon & Co. for

A person to whom a bill is restrictively indorsed for collection who has paid the amount of such bill to the indorser cannot by reason of such payment acquire rights on the bill against the acceptor, where the amount of the bill has been paid to the indorser before maturity.

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collection per account of the Bank of Mobile, Mobile, Alabama.

"A. F. MANLEY, Cashier."

The plaintiffs presented the drafts to the defendants for acceptance, and the defendants accepted the same. The plaintiffs thereupon allowed the Bank of Mobile to draw on them for the amount of the said bills.

Before the bills matured, the Dana Company paid to the Bank of Mobile the amount of the bills, and wrote to the defendants releasing them from their liability as acceptors.

The defendants never received any assignments of timber on account of these bills.

Subsequently both the Dana Company and the Bank of Mobile failed.

Finlay, Q.C., Mansel Jones, and Swinfen Eady, for the plaintiffs.

Sir F. Herschell, S.G., and T. T. Paine, for the defendants.

CAVE, J.—The question is what is the effect of a bill being restrictively endorsed? Sect. 35 of the Bills of Exchange Act, 1882, defines a restrictive endorsement as one which prohibits the further negotiation of the bill, or which expresses that it is a mere authority to deal with the bill as thereby directed, and not a transfer of the ownership thereof. We have therefore in this case an indorsement which is not a transfer of the ownership of the bill, but merely operates as an authority to the indorsee to receive the money on behalf of the indorser. This kind of indorsement was well known long before the Act of 1882. In *Lloyd v. Sigourney* (5 Bingham, 525) the bankers of the person to whom the bill was restrictively indorsed discounted the bill for their customer, and allowed him to apply the proceeds for his own use; and it was held that the bankers were liable for that amount to the indorser. Best, C.J., there says:—"Whoever reads the indorsement on this bill of exchange must perceive that its operation is limited, and that the object of the indorser was to prevent the money received in respect of the bill from being applied to the use of any other person than himself:

to whomsoever the money might be paid, it would be paid in trust for the indorser; and into whose hands soever the bill travelled, it carried that trust on the face of it. And we see no inconvenience to commercial interests from such a limitation of the effect of the indorsement so expressed; the only result will be to make parties open their eyes, and read before they discount." Those observations are eminently applicable in this case. The indorsee had authority to collect the amount of the bill; but the ownership of the bill and of the debt remained in the Bank of Mobile, and the payment to that Bank was a perfectly good payment. That it is a good payment is perfectly clear, unless the course of business between the plaintiffs and the Bank of Mobile makes a difference; for the appointment of an agent to receive a debt does not prevent the payment of the debt to the real creditor. Can, then, the arrangement between the plaintiffs and the Bank of Mobile, that the latter shall draw on the former for the amount of the acceptances, affect the rights of the parties to the bill, and alter the quality of the indorsement? Can it be that, if the Bank of Mobile does not draw against an acceptance, the defendants can pay the amount of the acceptance to the Bank of Mobile, but if the Bank of Mobile does draw, then the defendants can only legally pay the plaintiffs, and this, though the defendants know nothing about the arrangement between the plaintiffs and the Bank of Mobile? Again, if the property in the bill passes to the plaintiffs, *when* does it pass? Clearly not at the time of the indorsement. Does it pass, then, at the time the advance is made by the plaintiffs? This would be subsequent to the indorsement and delivery of the bill: and so the property in the bill would pass without indorsement or delivery. In my opinion the plaintiffs never got any property in the bill: they got merely an expectation that the money would be paid by the defendants: but were never owners of the bill. The plaintiffs' right of action is against the Bank of Mobile, and not against the defendants. As against the defendants, they cannot assert rights in respect of the bill which their indorsers, the Bank of Mobile, cannot assert; and it is clear that the Bank of Mobile have no cause of action against the defendants.

I do not think this decision can produce any mischief or

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inconvenience : as Chief Justice Best says ; “ parties must open their eyes and read before they discount.”

If the plaintiffs desire to secure themselves in the course of business they have adopted, they should insist upon a general indorsement, and not take a restrictive one. A restrictive indorsement has been long used for the very purpose of preventing the property in the bill from passing, and its effect as so doing has now been sanctioned by the Legislature ; and it would be very dangerous to hold that, by reason of a secret arrangement between indorser and indorsee, a title can be conferred, and the property pass, and so the rights of the acceptor be affected, without his knowledge.

Judgment for the defendants.

Godden, Holme & Co.

Truefitt & Gane.

DENMAN, J.

ODDY v. HALLETT.

1885.

May 5.

In an action for damages for wrongfully refusing to assign a judgment debt, the plaintiff is, *prima facie*, entitled to recover as damages the value of specific assets which would have been available for execution under the judgment, if assigned, and it is not incumbent on him, in the first instance to show that there was no other assets available.

THIS was an action for damages for wrongfully refusing to assign to the plaintiff a judgment debt recovered by the defendant against one Mackreth.

The facts, so far as material for the point on which the case is reported, are as follows :—

The plaintiff was the drawer of a bill of exchange for 106*l.* as surety for Mackreth the acceptor. The bill was dishonoured at maturity, and the defendant sued the plaintiff and Mackreth on the bill. Against Mackreth he obtained judgment by default ; the plaintiff defended the action, but, in November, 1883, the defendant obtained judgment against him for 106*l.* and 6*l.* costs. The plaintiff paid this money on February 8th, 1884. On the 15th of February, 1884, the plaintiff applied to the defendant for an assignment of the judgment under 19 & 20 Vict. c. 97, s. 5, enclosing a draft assignment, and offering to pay the costs of the same. On the 16th of February the defendant refused absolutely to execute the assignment. On the 21st of February Mackreth assigned his furniture by bill of sale. A month afterwards

the defendant offered to execute an assignment of the judgment. The only evidence given that Mackreth had other means than the furniture in question, elicited on the cross-examination of the plaintiff's witnesses, was to the effect that he was a solicitor, and as such claimed to be entitled to 300*l.* to 400*l.* for costs from clients. On these costs, however, there were prior charges amounting to about 250*l.*

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McIntyre, Q.C., and *Ashton Cross*, for the plaintiff.

Walton, for the defendant, contended that the *onus* was on the plaintiff to shew that there was no other property of Mackreth's available for execution, except the furniture: unless he proved this, the plaintiff failed to prove his damage.

DENMAN, J.—No : the evidence elicited as to "other means" is highly speculative : and the plaintiff has pointed to specific assets out of which he could have realized, or partially realized, his debt, but for the default of the defendant. I think that is, *primâ facie*, evidence of damage : and that it is not incumbent on the plaintiff to inquire all over the world as to Mackreth's means. The plaintiff having offered this *primâ facie* evidence, it is for the defendant, if he can, to prove that there were other assets of Mackreth's available for execution ; and this he has, in my opinion, failed to do.

F. J. Wood & Son.

Rodgers & Clarkson.

MATHEW, J.

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May 9.

WELCH v. BISHOP OF PETERBOROUGH AND OTHERS.

A vicarage consisted of two medietyes, the advowson of one of which was vested in the Lord Chancellor and of the other in W.

In August 1878 the Lord Chancellor, under 26 & 27 Vict. c. 120, sold the advowson of the first mediety to W., sect. 21 of that Act providing that it should not be lawful for the purchaser to sell or contract for the sale of the advowson or next presentation till the expiration of five years from the date of the sale to such purchaser. By Order in Council of May, 1879, ratifying a scheme prepared under 3 & 4 Vict. c. 113 (1) the two medietyes became one undivided benefice ; (2) W. became incumbent thereof ; (3) the advowson was vested in W., his heirs and assigns. In August, 1879, W. mortgaged the advowson of the consolidated benefice to H., to whom, prior to his purchase from the Lord Chancellor of the first mediety, he had mortgaged the second. All the mortgages contained the usual powers of sale. In March, 1882, H. died, and in March, 1883, his executors contracted to sell the whole advowson to his widow under the power of sale in the mortgage, and in April, 1883, the widow of H. contracted to sell it to E. In June, 1883, W. died insolvent, (the mortgage debt being still unpaid,) having by his will devised all his real estate to trustees in trust to receive the income thereof, and pay it over to his wife for her life. In December, 1883, the executors, on the nomination of H.'s widow, presented a person designated by E. to the Bishop for induction.

Held (1), that the right of nomination and presentation was in W.'s widow under his will and not in the executors of H. ; (2) that the Order in Council of May, 1879, did not avert the operation of the prohibition on sale for five years contained in sect. 21 of 26 & 27 Vict. c. 120 ; (3) that the presentation of the person designated by E. by the executors could not operate as a new contract of sale, though after the expiration of five years from August 1878, as the living being vacant at the time of such presentation, the contract would be invalid.

THIS was an action of *quare impedit* brought by the plaintiff against the Bishop of Peterborough and the executors of Richard Howes. The case was set down for trial at the Birmingham Winter Assizes, 1885, where the counsel agreed upon a statement of facts, which is embodied in the judgment, and the case was reserved for further consideration in London, and was argued on March 30th, 1885, and judgment delivered on May 9th.

The facts and arguments appear in the judgment.

Jelf, Q.C., and *Redman*, for the plaintiff.

W. Graham, and *A. K. Loyd*, for the defendants, the

executors.

Ram, for the bishop.

MATHEW, J.—The question raised in this action is whether the plaintiff or defendants other than the bishop had the right to present to the Vicarage of Pattishall in the diocese of Peterborough. The following are the facts as admitted by the counsel at the trial. The plaintiff, Laura Cotton Welch, is the widow of the Reverend Henry Foster Welch, and the defendants (other than the Bishop of Peterborough) are the executors of the late Richard Howes. The Vicarage of Pattishall formerly consisted of two Medietyes, known respectively as the Upper

Vicarage or 1st Mediety, and the Nether Vicarage or 2nd Mediety, and the profits and spiritual charge were divided between two incumbents with only one parish church.

The gross annual value of the combined Medieties was 456*l.* 17*s.*; the 1st Mediety or Upper Vicarage was of the annual value of 122*l.* 7*s.*, the 2nd Mediety or Nether Vicarage 334*l.* 10*s.*, including the value of the houses.

The advowson or right of patronage and nomination to the Upper Vicarage was vested in the Lord Chancellor, and that to the Lower Vicarage in the Reverend Henry Foster Welch.

In 1878 the Reverend Henry Foster Welch presented himself to the Lower Vicarage and was instituted.

On the 18th November, 1875, the Reverend Henry Foster Welch mortgaged the advowson of the Nether Vicarage to Richard Howes to secure 800*l.* and interest.

On the 27th of October, 1877, the said Henry Foster Welch further charged the said advowson of the Nether Vicarage to secure a further advance of 250*l.*

On the 12th of August, 1878, the Lord Chancellor, under the powers of the statute 26 & 27 Vict. c. 120, in consideration of 1,000*l.*, conveyed the advowson of the Upper Vicarage to the said Henry Foster Welch, subject to the then existing incumbency. It is provided by the said Act (section 21) that it shall not be lawful for the purchaser to sell or contract for the sale of the advowson or next presentation until after the expiration of five years from the date of the sale to such purchaser.

In February, 1879, the incumbency of the said Nether Vicarage having in the mean time become vacant, the Bishop of Peterborough framed a plan for the consolidation of the two vicarages, under the statute 3 & 4 Vict. c. 113, and submitted it to the Ecclesiastical Commissioners.

On the 20th of March, 1879, the Ecclesiastical Commissioners prepared a scheme in accordance with the said plan.

On the 17th of May, 1879, Her Majesty, in Council, ratified the said scheme, whereby: (1) the two medieties became, in respect both of the profits and the spiritual charge, one undivided benefice; (2) the said Henry Foster Welch became without any form or fee of institution, incumbent of the undivided benefice; (3) the whole advowson or right of patronage

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and nomination of the whole undivided benefice was vested in the said Henry Foster Welch, his heirs and assigns for ever.

On the 23rd of May, 1879, the Order in Council ratifying the scheme was published in the "London Gazette."

On the 1st of August, 1879, the said Henry Foster Welch mortgaged the advowson of the consolidated benefice to the said Richard Howes, to secure the previous and further advances, amounting together to 1,613*l.* 0*s.* 9*d.*

On the 26th of March, 1882, Richard Howes died, leaving a widow, Sarah Ann Howes, and having by his last will appointed the defendants (other than the Bishop of Peterborough) his executors, and subject to certain specific devises and bequests, devised and bequeathed his residuary real and personal estate to his executors, upon trust, for sale, conversion, and investment, and to stand possessed of the income thereof, upon trust for his said wife, Sarah Ann Howes, during her natural life.

Each of the above mentioned mortgages contained the usual power of sale.

On the 6th of March, 1883, the executors having failed to sell the advowson of the undivided benefice by auction, entered into a contract in writing to sell the said advowson to the said Sarah Ann Howes, for 900*l.*, and the said Sarah Ann Howes then paid a deposit of 90*l.* to the defendants (other than the bishop).

On the 5th of April, 1883, Sarah Ann Howes entered into a contract in writing to sell the said advowson to the Reverend John Ellison, of Sowerby Bridge, Normanton, for 1,000*l.*, and the said John Ellison then paid a deposit of 100*l.* to the said Sarah Ann Howes. The contracts are still subsisting, but neither of them has been completed.

The defendants, the executors of Richard Howes, received the proceeds of a policy on the life of said Henry Foster Welch, and also a further sum of 396*l.* 1*s.* 1*d.*, settled for Laura Cotton Welch for life, remainder to her children by present husband, and in default to the defendants, the executors of the said Richard Howes.

On the 25th of June, 1883, Henry Foster Welch died insolvent, and being indebted to these defendants in the sum of about 2,300*l.*, the greater portion of which, estimated at about 1,800*l.*, is still unpaid, leaving a widow, the present

plaintiff, and Thomas Henry Gascoyne Welch, his eldest son, and having by his last will given all his real and personal estate and effects, of whatever nature or wheresoever situated, to trustees in trust to receive the income arising from such estate, and pay the same over to his wife, the plaintiff, for her life, free from the debts or control of any husband, and after death of wife, for conversion into money, and to be distributed to children equally.

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In December, 1883, the defendants, at the request and on the nomination of Sarah Ann Howes, presented the Reverend John Simpson to the bishop, and requested him to institute and cause him to be inducted to the said vicarage.

Sarah Ann Howes so nominated the said Reverend John Simpson at the request of the said John Ellison.

In the month of December, 1883, the plaintiff, Laura Cotton Welch, presented to the defendant, the Bishop of Peterborough, the Reverend George Wintour, to be instituted and inducted to the living of Pattishall.

These defendants had no knowledge of this presentation until the 28th of December, 1883, when it was communicated to them by a letter from the bishop's secretary, dated the 27th of December, 1883.

On the 12th of March, 1884, the plaintiff nominated and requested the defendants, the executors of the late Richard Howes, to present to the bishop the said Reverend George Wintour, and to request the said bishop to institute and cause him to be inducted to the said vicarage, which they refused to do. This nomination is dated the 12th of March, 1884, but was received by the defendants on the 18th of March, 1884.

Prior to the 18th of March, 1884, the plaintiff had not nominated or requested the defendants, the executors of the late Richard Howes, to present any person to the said living, having herself nominated to the bishop the said Reverend George Wintour, in December, 1883.

The bishop has not inducted or caused to be inducted either of the said clerks, or any other, to the said vicarage, and has by his counsel submitted the question of the right to nominate to the judgment of the Court.

The plaintiff, in support of her right to the nomination, relied upon the will of her husband, Henry Foster Welch,

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by which he devised and bequeathed all his real and personal estate and effects, of whatever nature and wheresoever situate, unto trustees, their heirs, &c., in trust to receive the income arising from such estate, and pay the same to his wife (the plaintiff) for and during her life. It was contended for the plaintiff that she would clearly have been entitled to nominate as against mortgagees, and that her position was not altered by the attempted exercise by the defendants (the executors of the mortgage) of the power of sale contained in the mortgage to the testator, which power was of no effect, by reason of the prohibition contained in section 21 of 26 & 27 Vict., c. 120. For the defendants it was contended that the plaintiff had acquired no right so to nominate under the will of her husband, which, it was said, did not operate upon the advowson, and that as the heir-at-law had never been asked to present, the executors of the mortgagee were entitled to present to prevent the nomination from lapsing to the bishop. But upon the authority of *Hawkins v. Chappell*, 1 Atkins 621, followed by *Briggs v. Sharp*, L. R. 20 Eq. 317, I am of opinion that under the husband's will the right to nominate was in the plaintiff. She was beneficial owner for life of her husband's estate, real and personal, and there was no indication of an intention that the right to nominate during her lifetime should be exercised by any other person.

It was then said for the executors that the plaintiff was asking for the assistance of the Court as a Court of Equity, and that such aid ought not to be granted except upon the terms of payment of what was due upon the mortgage. But the answer to that seems to be that the plaintiff is not asking for the assistance of the Court as a Court of Equity, and the case of *Dyer v. Craven*, 1 Dickens 662, relied upon by the defendants' counsel, seems in no way applicable to the case. The plaintiff's contention is that she has the sole right to nominate, and that the executors have no right to prevent her doing so.

It was next argued for the defendants that though five years had not elapsed when the contract of sale was entered into, the defendants, after the expiration of five years, had been called upon by the purchaser to present him, and had done so; and this, it was said, was an affirmation of the contract, and was equivalent to a new contract at that date. But

this supposed affirmance took place after the living had become vacant, and at a time when no contract for the sale of the next presentation would have been valid.

The defendants next insisted that a good title to the consolidated benefice was derived from the scheme approved by Order in Council; and inasmuch as it was no part of the scheme that a sale should be prohibited, it was contended that the Act (26 & 27 Vict. c. 120) did not invalidate the agreement to sell. It was said that the Order in Council was equivalent to a private Act enabling the mortgagor to sell, and therefore averting the operation of 26 & 27 Vict. c. 120. But it seems to me that if such had been the intention of the Order in Council, it would clearly have been *ultra vires*. There is nothing in the statute 3 & 4 Vict. c. 113, to show that the Order in Council was intended to have the effect of controlling a subsequent Act of Parliament. But the terms of the Order in Council seem to me to indicate a contrary intention, for Clause 6 of the scheme ratified by the Order in Council continues existing disabilities attached to either mediety of the benefice. The fact that the two medieties were fused into one living is not incompatible with the existence of the disability. The case seems to me the same in principle as if at the time of the amalgamation each part had been subject to a similar restriction.

My judgment is therefore for the plaintiff, with costs. The costs of the bishop, to be ascertained on taxation, must also be paid by the defendants.

*Clarke, Woodcock & Ryland. Clarke, Rawlins & Co.
Bridges & Co.*

Ex relatione R. B. D. Acland.

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LOPEZ, J.

1885.
May 22.**HARRISON v. LONDON AND NORTH-WESTERN
RAILWAY COMPANY.**

A husband and wife were married, separated, and lived apart with out any maintenance for eight years before the wife's death, who was killed at the age of fifty-six, through the negligence of carriers. The wife had no surviving next of kin, and was not a party at the time of the wife's death, would have been absolutely entitled to the sum of £7,000. Held, in an action by the husband against the carriers for damages, under Lord Campbell's Act, that he had no reasonable prospect of pecuniary benefit if his wife's death had not occurred, and was not, therefore, entitled to damages for her death.

THIS was an action under Lord Campbell's Act by a husband, as administrator of his wife, claiming damages for himself for the death of his wife, which had admittedly been caused by the negligence of the defendants.

It was commenced at the Winter Assizes at Leeds, before a jury, but after evidence had been taken, it was agreed that the jury should be discharged, and that the further hearing should be adjourned, and taken before his Lordship in London; his Lordship to decide all questions of law and fact arising on the evidence.

The following were the material facts, as disclosed by the evidence:—

The plaintiff was fifty-nine years of age: his deceased wife was, at the time of her death, fifty-six. They had been married thirty-six years, and had several children. The plaintiff and his wife had lived on most unfriendly terms, and ceased to live together eight years before her death. During those eight years, though only living a few doors off one another in Bradford, they never spoke to one another, and only one letter passed between them. The children, during this time, lived with their mother and not with their father. The plaintiff at the time of his wife's death was in poor circumstances, earning about 80s. a week as a manufacturer's book-keeper, and contributing nothing to the support of his wife or children. The mother of the wife was at the time of the wife's death nearly eighty years of age. Under the will of her uncle, the deceased would have been absolutely entitled on the death of her mother to a sum of about 7,000*l.* if she survived her mother, but, in the event of her predeceasing her mother, this sum was to go to the children of the wife.

Wilberforce (Waddy, Q.C., with him) for the plaintiff.

Digby Seymour, Q.C., and M. Thompson, for the defendants.

The following cases were cited :—*Franklin v. South Eastern Railway Company*, 3 H. & N. 211 ; *Dalton v. South Eastern Railway Company*, 4 C. B. N. S. 296 ; 27 L. J. C. P. 227 ; *Pym v. Great Northern Railway Company*, 4 B. & S. 396 ; 32 L. J. Q. B. 377.

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LOPES, J.—The law is clearly and compendiously laid down in *Pym's case* by Erle, C.J., and the question is, Whether there was a reasonable probability of pecuniary benefit to the party interested if the death had not occurred ? and in considering that question of reasonable probability, I must take into account all the circumstances of the case, and all the contingencies and uncertainties that arise.

Now what are the facts ? (His Lordship here stated them, substantially as above set out.) Upon this state of facts I am satisfied that the wife would have done nothing to assist her husband even if she had had the power. But, further, it must be remembered that the wife might have predeceased her mother : or she might have disposed of her reversionary interest for her own benefit : or the husband might have predeceased the wife before the reversionary interest fell in. All these are possible contingencies.

It has also been suggested that the plaintiff might have applied for a restitution of conjugal rights, and have obtained from the Court, under sect. 3 of 47 & 48 Vict. c. 68,* a settlement of part of this property in his favour. But here, again, the thing is highly improbable. It is assumed, in the first place, that there would have been such an application : and, secondly, that the Court would have made such an order.

Lastly, it is suggested that the husband might become a pauper, and that if he did, he has lost the advantage of being

* Section 3. Where the application for restitution of conjugal rights is by the husband, if it shall be made to appear to the Court that the wife is entitled to any property, either in possession or reversion, or is in receipt of any profits of trade or earnings, the Court may, if it shall think fit, order a settlement to be made to the satisfaction of the Court of such property or any part thereof,

for the benefit of the petitioner and of the children of the marriage, or either or any of them, or may order such part as the Court may think reasonable of such profits of trade or earnings to be periodically paid by the respondent to the petitioner for his own benefit, or to the petitioner or any other person for the benefit of the children of the marriage, or either or any of them.

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supported by his wife, a wife being now by law legally bound to support a pauper husband. But I cannot assume that the husband would become a pauper, or give him damages, on the ground that if he did, he has lost the benefit of his wife's support.

In my opinion all these suggested heads of damage are too remote: dependent on contingencies, which might or might not have occurred, and on assumptions of things which I cannot assume. I hold that there was no reasonable probability of pecuniary benefit to the plaintiff if his wife had not died: and I give judgment for the defendants.

H. F. Wood.

R. F. Roberts.

LOPES, J., and a S. J.

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May 18.

HOLTON AND WIFE v. LONDON AND SOUTH-
WESTERN RAILWAY COMPANY.

The duty of a carrier who manufactures his own carriages towards passengers whom he carries is to use due skill and care in the manufacture. If injury occur through imperfect construction, the onus is on the carrier to shew that such due skill and care has in fact been exercised.

ACTION for damages for personal injuries to the female plaintiff whilst travelling as a passenger on the defendants' line.

The injuries were caused through the breaking of a link in a coupling chain, which was manufactured by the defendants themselves.

The link was imperfectly welded; there being no metallic union inside the weld, owing to some slag having got in during the process of welding.

Sir H. Giffard, and Manisty, for the plaintiffs.

Lockwood, Q.C., Moulton, and Kinglake, for the defendants.

LOPES, J., to the jury (as to the point in the case raised by the above-stated facts):—The defendants were themselves the manufacturers of the link; it was, therefore, their duty to use proper skill and care in its construction; and it is for them to satisfy you that they have done so. You must be satisfied

that they used proper materials, and that their servants in manufacturing it used reasonable skill and care.

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Judgment for the plaintiffs.

Cleveland & Co.

Bircham & Co.

See *Francis v. Cockerell*, L. R. 5 Q. B. 184; and in Ex. Ch. 501.
See too *ante*, note to *Gilbert v. North London Railway Company*, p. 33.

HUDDLESTON, B.

COATSWORTH v. JOHNSON.

1885.

June 2.

THIS was an action by a tenant against his landlord for damages for illegally turning him out of his farm.

Murphy, Q.C., and Bucknill, for the plaintiff.

Webster, Q.C., Lockwood, Q.C., and R. S. Wright, for the defendant.

The facts and arguments sufficiently appear from the judgment.

HUDDLESTON, B.—This is an action brought by the plaintiff, the tenant of Stocks Green Farm, Kent, against the defendant, his landlord, who is a London solicitor, for a trespass in illegally breaking and entering the farm and turning the plaintiff out of possession. The defendant justified on the ground that the plaintiff had committed a breach of covenant, and that he had terminated the tenancy by due notice. The terms of the tenancy were contained in a written agreement of the 9th of October, 1888, which was not under seal, by which the defendant agreed to let the farm for a term of twenty-one years from the 11th of October, 1888, the plaintiff paying the amount of valuation to the outgoing tenant, and accepting a lease of the farm in a form prepared, and the draft of which was signed as approved by the parties.

The draft lease contained, among other covenants, a cove-

A person in possession of premises under an agreement for a lease who has paid no rent, and done acts which would have amounted to breaches of covenants in the intended lease, and have occasioned a forfeiture, is not in a position to enforce specific performance of the agreement. Sect. 14 of the Conveyancing Act, 1881, does not apply to agreements for leases.

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nant to use and cultivate the farm lands in a good and husbandlike manner, according to the most approved course of husbandry adopted in that part of the country. There was a power of re-entry on breach of any of the covenants.

On the 23rd of November, 1883, there was a further written agreement, not under seal, between the parties, by which the plaintiff agreed that, on the defendant's allowing him 350*l.* for certain repairs, he would carry out the repairs and alterations and spend the sum of 400*l.* thereon, and that the rent of the farm should be 200*l.*, instead of 195*l.*, as in the draft lease; the 400*l.* to be expended within twelve months from the 23rd of November, 1883. On the trial the trespass was not denied, but the jury found that the plaintiff had been guilty of a breach of covenant in that he did not use and cultivate the farm and land in a good and husbandlike manner according to the most approved course of husbandry adopted in that part of the country.

The defendant had, by a notice of the 2nd of April, taken all the necessary steps to entitle him to enter under such breach of covenant. The jury assessed the damages on the supposition that the defendant was not entitled to justify at 500*l.* I reserved the case for argument on further consideration.

On the part of the defendant it was contended that the plaintiff was only a tenant at will, and that the tenancy had been determined by notice from the defendant on the 2nd of April, 1884.

The plaintiff, on the other hand, argued that he was a tenant holding under a lease which was enforceable in equity, or at least was a tenant for twelve months certain, and that there had been no valid notice to determine such a tenancy.

The defendant alleged that, under any circumstances, the breach of covenant would entitle him to re-enter.

The plaintiff urged that the defendant had not complied with the provisions of the Conveyancing Act, 1881, and therefore he could not recover on a breach of covenant, but, even if he could, there had been a waiver by the defendant's having taken certain proceedings against him in Chancery.

The plaintiff had not paid any rent; there was no lease, as there was no instrument under seal, and he held only under an agreement for a lease at most.

In *Braythwayte v. Hitchcock* (10 M. & W. 497) Baron Parke says : " The law is clearly settled that where there has been an agreement for a lease, and an occupation without payment of rent, the occupier is a mere tenant at will."

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The plaintiff, therefore, must be considered as a tenant at will, and, as the will was determined on the 2nd April, the defendant would be entitled to enter.

Mr. Murphy contended that, since the Judicature Act, he could recover, as in equity he would be entitled to have specific performance.

It is to be observed that the plaintiff does not claim specific performance, and he might have done so in reply to the counter-claim, but as, since the Judicature Act, the common law has cognizance of questions of equity, if it had been necessary I would have amended the pleadings accordingly.

In *Walsh v. Lonsdale* (L. R. 21 Ch. Div. 141), the late Master of the Rolls points out that a tenant holding under an agreement for a lease of which specific performance would be decreed stands in the same position as to liability as if a lease had been executed. He is not, since the Judicature Act, a tenant from year to year ; he holds under the agreement, and every branch of the Court must now give him the same rights under the same terms in equity as if a lease had been granted. And as I am of opinion that the agreement might be enforced as if there was a lease, it does not become necessary to consider the suggestion made, that there might be a parol lease as discussed under the authority of *Lord Bolton v. Tomlin* (5 Ad. & E. 868), which, however, was only the case of a parol demise.

I have, therefore, to consider whether in this case a decree for specific performance would be granted.

Mr. Murphy argued that it could only be refused where there was irreparable injury. The authorities, however, go to shew that a breach of covenant for not cultivating would prevent a party obtaining specific performance.

In *Hill v. Barclay* (18 Ves. 68) Lord Eldon is of opinion that a tenant who has treated the land in an unhusbandlike manner, and been guilty of a breach of such covenant for which the lessor had a right of re-entry, could not have specific performance of an agreement for a lease.

In *Lewis v. Bond* (18 Beav. 85) Lord Romilly points out

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that though the Court will relieve in some cases, as in the case of a breach of a covenant to insure, in others it will not, and the Court will not compel a grant of that, which, if already granted, would have been forfeited.

Gregory v. Wilson (9 Hare, 683) is to the same effect: the Vice-Chancellor there says that the Court will refuse its interference if satisfied that there has been a forfeiture on which an ejectment could be maintained.

The authorities are all collected by Lord Justice Fry in his work on Specific Performance, 2nd edit. p. 419, sect. 938, where he states the result to be that if the acts be such as would have worked a forfeiture of all benefit of the contract if it had been executed, "it would be idle for the Court to compel a grant of that which, if granted, would have been forfeited—to create a legal relation which, if created, would be immediately dissoluble;" and at p. 420, he says, "It is well established that where a person, holding under an agreement, commits waste, treats the land in an unhusbandlike manner, or acts in breach of covenants which would be contained in the lease, and for which acts a right of re-entry would accrue to the landlord, such person cannot enforce a specific performance of the contract."

I think, therefore, that this is a case in which specific performance would not be granted, and that, therefore, the plaintiff cannot recover on that ground.

But it was further contended that, under the provisions of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41, s. 14), as no notice had been served specifying the breach complained of, and requiring the lessee to make compensation in monies, that the right of re-entry or forfeiture for the breach of covenants is not enforceable; but I am clearly of opinion that the 14th section of this Act only applies to leases and not to agreements. This seems obvious, not only from the words, but from the spirit of the Act.

Sects. 10 to 14, inclusive, apply to leases only; and, although there are headings of sets of sections relating to mortgages, trustees, married women, powers of attorney, &c., there are no clauses applicable to agreements. Sub-sect. 13 refers to a contract to grant a lease, shewing that the attention of the Legislature must have been directed towards agreements, and yet none of the provisions under the 14th section

apply to anything but leases. Sub-sect. 1 of sect. 14 applies specifically to a lease. Sub-sect. 2 speaks of the lessor and not the tenant. Sub-sect. 3 shows that a lease would include an under-lease, the grant of a fee farm rent, or securing a rent by condition.

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It was further urged that, looking at the terms of the agreement of the 23rd November, as it was contemplated that the plaintiff should be in possession for a year to complete the repairs, the tenancy must be something more than that of a tenant at will and perhaps for a year certain.

I think, however, that the agreement of the 9th of October, if even it be varied by that of the 23rd November (although that would appear doubtful) is clearly an agreement for seven, fourteen, or twenty-one years, and not for one year, and that the plaintiff would be entitled either to his seven, fourteen, or twenty-one years term or nothing.

But even if it were a tenancy for a year, then it must be subject to the terms of the agreement, and the forfeiture for breach would apply.

It was further urged that there had been a waiver of the forfeiture by certain proceedings taken by the defendant in equity against the plaintiff to prevent certain acts of the plaintiff in removing hay from his premises, and that the continuance of the suit from the 11th of February to the 1st of April was an unequivocal act of waiver. But, looking at the pleadings, I find that the question of waiver is not raised, and the only reference to the defendant's action in Chancery is to be found in the plaintiff's reply, 4th paragraph, section 3, where it certainly is not pleaded as a waiver of the forfeiture. Nor was I asked to put the question of waiver to the jury.

My attention was not called to the fact of the waiver not being pleaded during the argument, and I am by no means prepared to say that I would have allowed an amendment if even it had been applied for, as I thought the evidence showed that the plaintiff was not entitled to much indulgence, because he had obtained possession of the farm under representations which the cross-examination as to his impecunious position clearly showed he was not in a position to carry out. Moreover, the breach here was a continuing breach, and continuing after the termination of the Chancery proceedings, and there was no evidence to show that the defendant knew

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of the breach of the covenant at the time of his instituting the proceedings in Chancery. *Oxford v. Provand*, L. R. 2 P. C. 135; *Jones v. Carter*, 15 M. & W. 727.

I am, therefore, of opinion on all these grounds that the judgment must be entered for the defendant with costs.

Lowless & Co.

J. H. Johnson.

DAY, J.

LANE v. MOEDER.

1885.
June 10.

A lease provided that on its termination the tenant should receive compensation for unexhausted improvements. At its termination, a new lease of the farm was granted to the tenant, nothing being said about the compensation. Held, that the tenant was entitled to compensation under the first lease.

THIS was an action for rent: the claim was admitted, and the question was whether the defendant was, on his counter-claim, entitled to compensation for unexhausted improvements.

By agreement of lease made on the 30th of August, 1873, the plaintiff let to one Stevens a farm and lands in Middlesex, for a term of five years and one quarter from the 24th of June, 1873, at a rent of 220*l.* per annum. The agreement contained a clause by which the tenant agreed that he, his executors, administrators, or assigns (*inter alia*) "will, with a view to the arable land hereby demised being laid down in permanent pasture, forthwith thoroughly cleanse the same, and will then in a proper and husbandlike manner thoroughly dress the same arable land, and either in the spring of the year 1875 or of the year 1876 get in seeds (the seeds being provided by the landlord) as hereinafter mentioned," &c.

The agreement also contained the following clause:—

"And the landlord doth hereby for himself, his heirs, executors, and administrators, agree with the tenant, his executors, administrators, and assigns, that he the landlord, his heirs or assigns will, on being satisfied that the arable land hereby demised has in accordance with the agreement in that behalf herein contained been properly prepared for being laid down in permanent pasture, provide at the Elstree Station of the Midland Railway Company the necessary seeds

hereinbefore mentioned. And will, on the determination of the said tenancy, either wholly or partially, under the clauses for that purpose hereinafter contained, or otherwise according to the custom of the country, pay for the unexhausted improvements on the land and buildings. Provided, as regards the buildings, such improvements have been made with the previous written sanction of the landlord. Also for the acts of husbandry, crops and manure (if any) left on the premises or spread on the land according to the custom of the country at a valuation to be made in the usual way."

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In accordance with the agreement, the arable land was converted into pasture. In December, 1875, Stevens assigned his term to the defendant.

In September, 1878, a new agreement was made between the plaintiff and the defendant for the letting of the farm for another term of five years as from the expiration of the first term at Michaelmas, 1878. This was almost identical in its terms with the previous agreement, but was silent as to the conversion of arable land into pasture. No claim for compensation for the conversion of the arable land into pasture was made by the defendant on the granting of the fresh term. This action was brought after the expiration of the second term. It was admitted that, according to the custom of the country, the tenant was not entitled to be paid for improvements in turning arable land into pasture.

Finlay, Q.C., and *A. C. Nicoll*, for the plaintiff, contended that on the true construction of the agreement of 1873 the tenant was not entitled to be paid for this improvement: and that the granting of the new lease in 1878 put an end to the claim.

Charles, Q.C., and *W. Graham*, for the defendant.

DAY, J.—I think the tenant is in the right here, and that, on the true construction of the agreement, the improvement of converting the arable land into pasture must be compensated for by the landlord paying according to the custom of the country. Then as to the new agreement of 1878. That, in my opinion, affords no evidence of an accord and satisfaction. On the contrary, the making of the new term, and the tenant remaining in occupation accounts at once for the delay in making the claim, and explains why it was not

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made before. The amount due for the unexhausted improvement will be ascertained by an arbitrator as agreed upon by the parties.

Senior Altree & Johnson.

Sharpe, Parkers & Co.

DAY, J.

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June 11.

MACARTHUR AND OTHERS v. HOOD AND MILLER.

Since the abolition of pleas in abatement, the proper course for a defendant desirous of raising the objection of the non-joinder as a defendant, of some one jointly liable with him, is to apply by summons at Chambers, supported by an affidavit stating the facts, and showing that the person alleged to be jointly liable is within the jurisdiction to have the action stayed.

THIS was an action on a mortgage deed to recover the principal monies and interest in arrear.

The deed was executed in Canada by the mortgagee and the three mortgagors, Hood, Miller, and Nichols, to secure the repayment by the mortgagors to the mortgagee of the sum of 5,000 dollars and interest; and in it the three mortgagors covenanted jointly, but not severally, for repayment of the sums secured by instalments; default in payment of certain of the instalments having been made, this action was brought against the defendants Hood and Miller only.

One of the defences pleaded was that Nichols was jointly liable and ought to have been joined as a defendant, and that against the defendants Hood and Miller alone the action was not maintainable.

Lumley Smith, Q.C., and McClymont, for the plaintiff.

Percy Gye, for the defendants, contended that the covenant being a joint covenant only, could not be enforced against two of the covenantors unless the third was also joined. No doubt the proper mode of raising this objection before the passing of the Judicature Acts was by plea in abatement, a thing which is now abolished by those Acts; but it is the form of proceeding alone which is abolished; the right of a person jointly liable with another to have his co-contractor joined as a defendant remains untouched. He cited *Kendall v. Hamilton*, L. R. 4 App. Cas. 504; per Cairns, L.C., at p. 516.

DAY, J.—Even so, it is necessary that the defendant raising such a point should shew that the co-contractor, of whose

non-joinder he complains, is within the jurisdiction, and that does not appear on the pleadings.

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Percy Gye.—It was only by virtue of 3 & 4 Will. IV. c. 42, s. 8, that it became incumbent on the defendant to shew that. That section was intended to prevent a defendant *absolutely* defeating an action on the ground of the non-joinder, because service out of the jurisdiction did not exist, and sect. 8 of 3 & 4 Will. IV. c. 42, was expressly repealed by 46 & 47 Vict. c. 49, s. 4.

DAY, J.—In my opinion the defendants' proper course was to have applied by summons at chambers, supported by an affidavit of the facts, to have this action stayed until the co-contractor was joined, and then the action would have been stayed if the co-contractor was within the jurisdiction. That course has not been adopted; and I give judgment for the plaintiffs.

Lee & Pemberton.

R. Routledge.

POLLOCK, B.

KEITH v. BURKE.

1885.

June 11.

THIS was an action on three bills of exchange by the indorsee and holder against the drawer. The bills, which were for 300*l.*, 600*l.*, and 300*l.* respectively, had been duly accepted, and were payable on the 29th of May, 1877, 6th of June, 1877, and the 29th of June, 1877, respectively. The bill due on the 29th of May, 1877, was not presented for payment, and no notice of its dishonour was given to the defendant. On the 31st of May, 1877, the acceptor committed suicide. Neither of the two other bills was presented for payment, nor was any notice of dishonour given to the defendant.

The drawer of a bill, after its maturity, wrote a letter to the holder in the following terms: "I accept notice of non-payment of my draft, and admit my liability to you therein in every manner as though the same had been given in a regular way." The bill in question had not, in

fact, been presented for payment, but of this the drawer, when he wrote the above letter, was ignorant.

Held, that there had been no dispensation by the drawer of the consequences of non-presentment for payment.

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There was a conflict of evidence as to whether at the beginning of June, 1877, there had been an interview between the plaintiff and the defendant, at which the defendant dispensed with the necessity of the plaintiff presenting the two bills of June 6th and June 29th; but as to this his Lordship found that the plaintiff failed to prove any such dispensation, or any knowledge by the defendant that the bills then due had not been duly presented for payment.

On the 7th of June, 1877, the defendant wrote to the plaintiff a letter in the following terms:—

“I hereby admit notice of the non-payment of my draft, value 600*l.*, on the late W. Coxhead, due yesterday, 6th of June, 1877, and acknowledge my liability as drawer and endorser of the same.

“W. H. BURKE.”

On the 11th of July, 1877, the defendant wrote to the plaintiff a letter in the following terms:—

“I accept notice of non-payment of my draft on W. Coxhead for 300*l.*, dated 26th of April, 1877, and due June 29th, 1877, and admit my liability to you therein in every manner as though the same had been given in a regular way.

“W. H. BURKE.”

The defendant knew of the acceptor's death immediately after it occurred; he also knew that he was at the time in straitened pecuniary circumstances, and that he had left no executor.

Lyon, for the plaintiff, admitted that he could not recover on the first bill, but as to the two others, contended that the two letters amounted to a waiver of all previous informalities, and were absolute promises to pay the bills. He cited *Croxon v. Worthen*, 5 M. & W. 5; *Lundie v. Robertson*, 7 East, 231; *Campbell v. Webster*, 15 L. J. C. P. 4; 2 C. B. 258.

Russell, Q.C., and *Hilbery*, for the defendant.

POLLOCK, B.—As to the two latter bills, the question is whether the two letters or either of them amount to a waiver of the non-presentment of the same for payment. I am of

opinion that they do not. The letter of July 11th is, in my opinion, the most in favour of the plaintiff; but notice of non-payment means notice of dishonour, and the concluding words restrict the operation of the waiver to the effect of not giving that notice. I cannot import the words "and of non-presentment" into the document; nor can I import them into the letter of June 7th. There must be judgment for the defendant.

L. G. Godden.

Hilberys.

WILLS, J., and a C. J.

EMMENS v. POTTLE & SON.

Action for libel.

The defendants were newsvendors at the Royal Exchange, London.

The plaintiff called a witness, who proved that he saw outside the defendant's shop a contents bill of a newspaper called "Money," with the words "Dr. Emmens" thereon, and that he was thereby induced to buy the newspaper. The newspaper contained a libel on the plaintiff.

The defendants proved that they sold the newspaper in the ordinary way of their trade, that they did not know what was in it, nor had they noticed what was on the contents bill.

The plaintiff appeared in person.

Clarke, Q.C., and *Julian Robins*, for the defendants, contended, on the authority of *Day v. Bream* (2 Mood. & Rob. 54), and *Chubb v. Flannagan* (6 C. & P. 431), that the evidence of the defendants, if believed, was an answer to the action.

WILLS, J., directed the jury that, giving currency to the newspaper as the defendants had done was, *prima facie*, a publication of it.

In answer to questions put to them by the learned judge, the jury found that the defendants did not know that the newspaper contained a libel on the plaintiff; that it was not by reason of any negligence on their part that they failed to

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June 16.

A newsvendor who in the ordinary course of business sells a newspaper containing a libel, is not liable to the person libelled, if (1) he did not know that the newspaper contained the libel; (2) such want of knowledge was not owing to negligence on his part; (3) the paper was not one likely to contain libellous matter.

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know this; and that the defendants did not know, nor ought they to have known, that the paper was likely to contain libellous matter.

On these findings his Lordship directed judgment to be entered for the defendants.

Plaintiff in person.

Gilbert Robins.

WILLS, J.

VOINET v. BARRETT.

1885.

June 23.

Where a person sued in a foreign court appears, although he does so in consequence of the duress of wishing to protect his property there, which, unless he appeared, would be liable to seizure, he cannot afterwards dispute the validity of the judgment in an action upon it in an English court.

ACTION on a foreign judgment.

F. M. Abrahams for the plaintiff.

Bompas, Q.C., and *Clay* for the defendants.

The facts and arguments sufficiently appear from the judgment.

WILLS, J.—This is an action upon a French judgment, the judgment of the Court of Commerce at Besançon, by which the plaintiffs recovered against the defendants a sum of 367*l*.

The action was commenced in the French Court at Besançon by process, which issued from that Court on the 6th of February, 1879.

The object of the action was to declare that three contracts relating to 20,835 kilometres of pure bone grease were at an end; and also to procure a declaration that the three consignments of the 17th of May, the 14th of December, and the 21st of December, 1878, were not in accordance with the contracts; and to procure a declaration further that the merchandise remained where it was, partly at the warehouse in Paris and partly at Besançon—either on the plaintiff's premises or at the railway station, at the risk of the defendants; and finally to recover 16,084 francs, 20 centimes, being the sum actually paid by the plaintiffs to the defendants in respect of the first delivery, and the aggregate of the two sums for which they were under acceptances in respect of the two other deliveries, but which acceptances had not then matured, and also the sum of 3,000 francs for damages.

The defendants, who were Englishmen domiciled and carrying on business in this country and not in France,

appeared to this process, which had been served upon them personally in London. There was no property of theirs in the hands of the Court under any process of arrest or otherwise, but they had large business transactions with French houses, and were frequently in such a position that a judgment in a French Court might be executed against their property in France.

On the 28th of June, 1879, the Court of Commerce at Besançon pronounced a judgment appointing Monsieur Barbier, an expert, to inquire into certain questions connected with the matters in dispute. By the same judgment they rejected the demand of the plaintiffs in respect of the first consignment, and reserved the question as to the second and third consignments until after the report of the expert should have been received.

The expert made his report. On the 1st day of May, 1880, on objection by the defendants that Monsieur Barbier's method of analysis was not satisfactory, nor appeared to them complete, the Court directed a fresh *expertise*, and requested the Tribunal de la Seine of Paris to nominate three experts to proceed to a fresh inquiry. On the 16th of May, 1881, the report of these Parisian experts was, pursuant to the directions given in the judgment of the 1st of May, 1880, deposited at the Greffe or Registry of the Court at Besançon.

The report was unfavourable to the defendants, and, on the 20th of August, 1881, the judgment now sued upon was pronounced against them in their absence, and in default of their appearance.

Now no further statement of facts is necessary to raise the first contention of the defendants, which was that where a party appears as a defendant in the Court of a foreign country, and his reason for doing so is that he has property in that country liable to seizure under the process of the foreign Court, which he cannot otherwise protect, he is not necessarily as a consequence of his having appeared in that Court, bound to submit to the judgment of the foreign Court.

The question is certainly not altogether free from doubt, and it is necessary to examine carefully the state of the authorities. They appear to me to be as follows:—In the case of the *General Steam Navigation Company v. Guillou* (11 M. & W. 877) the plaintiffs sued the defendant in the

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English Court for a collision on the high seas. There was a plea more complicated, than I am stating it, but which reduced to its simplest elements, as far as the matter now under discussion is concerned, was, that the then defendant had sued the then plaintiffs in the French Court for the said collision, and that the then plaintiffs had appeared in the French Court and had had judgment against them.

That plea was held bad upon an objection which could not be raised nowadays, but which had its full effect at the time (I am speaking of 1843), namely, that inasmuch as it was substantially a plea of estoppel, and that it had not a proper formal commencement and conclusion, such as were necessary to make a correct plea of estoppel, it was, therefore, held bad upon the special demurrer. But the Court took the occasion of expressing an opinion which, although it is under the circumstances entitled to great weight, seeing the quarter from which it comes, yet can hardly be considered as more than an *obiter dictum*, and that expression of opinion was that although it was unnecessary to give any opinion whether the pleas were bad in substance, Baron Parke said, "It is not to be understood that we feel much doubt upon that question. The pleas do not state that the plaintiffs were French subjects or resident in France when the suit began, so as to be bound by reason of allegiances or domicile or temporary presence by a decision of the French Court, and they did not select the tribunal and sue as plaintiffs; in any of which cases the determination might have possibly bound them. They were mere strangers who put forward the negligence of the defendant as an answer in an adverse suit in a foreign country whose laws they were under no obligation to obey."

Undoubtedly the expression of opinion there is that, under those circumstances, they would not be bound by the judgment of the foreign Court.

The same question, or very nearly akin to this, was considered a few years later, in the year 1851, in the case of *The Bank of Australasia v. Nias* (16 Q. B. 717). There the circumstances under which, and the extent to which the judgment of a foreign or colonial Court (for they are both put upon the same footing in that respect) is examinable in an action in this country to enforce it, was very much discussed.

It was held, according to the marginal note, which seems to me to be correct, that, although in such an action the judgment is examinable to a certain extent, as far as for the purposes of showing want of jurisdiction, or that the defendant was not summoned, or that the judgment was fraudulently obtained, yet such judgment was not examinable upon the merits, as for the purpose of shewing that the contract sued upon was not made, or was procured by fraud, or that the judgment was erroneous. The Court said there:—
 “Doubtless it is open for the defendant to shew that the foreign Court had not jurisdiction of the subject-matter of the suit, or that he never was summoned to answer, and had no opportunity of making his defence, or that the judgment was fraudulently obtained.”

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The case of the *General Steam Navigation Company v. Guillon* does not seem to have been quoted or under consideration in that case.

The next case in order of time on this subject was the case of *De Cosse Brissac v. Rathbone*, 6 H. & N. 301. That case was decided on demurrer. There was an action on a foreign judgment, and by way of defence to this action it was alleged that the defendants were subjects of her Majesty, and were in no ways resident or carrying on business or domiciled in France, but always in England; and that in the suit in the French Court they had been defendants—that they were possessed of property in France which would be liable to seizure in case the judgment went against them in default of appearance, supposing they did not appear; and for that purpose, and in order to prevent their property being so seized, they authorized an agent to appear for them in the suit in France, and thereupon they did appear; they then go on to say that the judgment upon which the present action was founded, and which was then sued upon, was a judgment founded upon the former judgment in one of the Courts in France, and it was given in the same suit for the purpose of carrying out the first-mentioned judgment, and fixing the amount of damages for which the defendants were liable upon the first-mentioned judgment. Then they allege that the judgment was erroneous in fact and in law, and upon the merits, and that it ought not to have been in favour of the plaintiffs.

The Court held there that the question was so pre-

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cluded by the authorities that it was impossible to decide contrary to them, and their judgment was for the plaintiffs; holding that the grounds alleged, namely, that the defendant had appeared in the foreign Court so far under duress that he appeared simply to protect his property from seizure in case an adverse judgment should be given against him by default, was no ground for allowing him to refuse to obey the judgment of the tribunal to which he had submitted. It is to be observed that the case of the *General Steam Navigation Company v. Guillou* was quoted in that case, and was under discussion; therefore it is impossible to escape from the conclusion that the Court had the very question which is now before me, and which I am now discussing, before them, and decided it adversely to the defendant in that suit, and, therefore, to the defendants in this suit.

Shortly afterwards there came, in the year 1868, the case of *Simpson v. Fogo* (1 H. & M. 195), which was an action upon the judgment of the Court at Louisiana. It was suggested in the course of the argument that it was a judgment *in rem*, because the defendants were mortgagees of the ship in respect of which the action was brought; but that was hardly so. The Vice-Chancellor points out in the course of his judgment that the ship had been seized under a process analogous to our process of *fi. fa.*, and that it was merely a suit *inter partes*, and therefore the Vice-Chancellor treated the question which I am now discussing as concluded by the case of *De Cosse Brissac v. Rathbone*, and he appears to have entirely concurred in the judgment himself.

Then again, in the year 1870, there was the case which has been so much discussed, of *Schibsbys v. Westenholz* (L. R. 6 Q. B. 155). At p. 162 Mr. Justice Blackburn, in delivering the judgment of the Court, sums up what he conceives to be the result of the authorities. I do not know that I should have thought it necessary to go further into this part of the question except for the fact that undoubtedly there seems to me to have been misapprehension in the course of that judgment as to what had been decided by some of the cases which were under review. Inasmuch as it is very desirable to clear away any misapprehension of that sort, I think it is only right I should point out how it is that it appears to me there is a misapprehension as to what was decided in the

case of the *General Steam Navigation Company v. Guillou*, and the case of *De Cosse Brissac v. Rathbone* respectively. The learned judge says, after citing the passage from the case of the *General Steam Navigation Company v. Guillou*, which I have already read : " It will be seen from this that those very learned judges, besides expressing an opinion conformable to ours, also expressed one to the effect that the plaintiffs in that suit did not put themselves under an obligation to obey the foreign judgment merely by appearing to defend themselves against it. On the other hand, in *Simpson v. Fogo*, where the mortgagees of an English ship had come into the Courts of Louisiana to endeavour to prevent the sale of their ship seized under an execution against the mortgagors, and the Courts of Louisiana decided against them, the Vice-Chancellor and the very learned counsel who argued the case " (the counsel who were concerned to raise the question, and who were to argue the question, if they felt it to be arguable, were Sir Hugh Cairns and Mr. Charles Hall) " seem all to have taken it for granted that the decision of the Court of Louisiana would have bound the mortgagees had it not been in contemptuous disregard of English law." That is to say, the Court there professing to deal with English law, had correctly stated what they believed to be English law, and then decided against it, although, it was said, according to all legal principles, and as they admitted, it ought to be decided by English law. Mr. Justice Blackburn proceeds, " The case of the *General Steam Navigation Company v. Guillou* was not referred to, and therefore cannot be considered as dissented from ; but it seems clear that they did not agree in the latter part of the opinion there expressed."

I have pointed out already that the case of *De Cosse Brissac v. Rathbone* was cited and relied upon, and in that case the *General Steam Navigation Company v. Guillou* was under discussion, and therefore, although it is not specifically mentioned in the report of the argument, in that sense it is dissented from, because the judgment which had really dissented from it, and which cannot be considered as anything else than a formal judgment dissenting from it, had been followed and approved. The judgment goes on to say :—" We think it better to leave this question open, and to express no opinion as to the effect of the appearance of a defendant where it is so

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far not voluntary that he only comes in to try to save some property in the hands of the foreign tribunal." Now certainly, unless I misunderstand that sentence in its connection with what goes before, it seems rather to point to this view, that in each of the cases of *Simpson v. Fogo*, and the *General Steam Navigation Company v. Guillou*, the defendant had appeared to try and save property in the hands of the foreign tribunal, and it was decided one way by one decision, and the other way by the other. I cannot find in the pleadings in the *General Steam Navigation Company v. Guillou* that there was any obligation of that kind, and it seems to me, as far as one can gather from the pleadings in the *General Steam Navigation Company v. Guillou*, that that was a case, as far as appears, of a purely voluntary appearance, and under no compulsion or duress or anything of that kind. "But we must observe," the judgment goes on, that "the decision in *De Cosse Brissac v. Rathbone* is an authority that where the defendant voluntarily appears, and takes the chance of a judgment in his favour, he is bound."

I cannot help thinking with Mr. Abrahams, that in that phraseology the voluntary appearance which is attributed to the case of *De Cosse Brissac v. Rathbone* really means an appearance voluntary as contradistinguished to one made under that species of duress which consists of the necessity of attempting to save your property from execution if you do not appear at all, whereas, as I have pointed out in the case of *De Cosse Brissac v. Rathbone*, the allegation in the plea was that the defendant had property in France which he wished to save from possible execution, and therefore for that reason he appeared. Therefore, it seems to me rather as if the nature of the decision in the case of the *General Steam Navigation Company v. Guillou* and that of *De Cosse Brissac v. Rathbone* had been misplaced, and the decision which was really that of the latter case has been attributed to the former, and that which was really that of the former case has been attributed to the latter. If so, it seems to me to be incorrect to say that that particular question was at that time still undecided, because it seems to me that it is impossible to distinguish the case of *De Cosse Brissac v. Rathbone* from the present case, and that it is impossible to deny that in that case it was expressly

alleged that the appearance of the defendants was not to save property then in the hands of the tribunal, but what is nearly as cogent a species of duress, namely, the necessity of saving other property from execution in case a judgment by default should be obtained in the Court.

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It seems to me, therefore, that that question really in the year 1870 was not an open question, and it is not an open question now, so far as decisions go.

As to the other cases which have been cited, the only one which seems to me to have any bearing on the subject is the case of *Duflos v. Burlingham* (34 L. T. N. S. p. 688). That was a case in the year 1876. The action was on a foreign judgment upon a contract entered into in this country and not elsewhere, and the plea in that action was that before the judgment the defendant was never resident or domiciled, or within the jurisdiction of the French Court, nor did he ever owe allegiance to that country, nor was he at the time of contracting the alleged obligation, in France or within the jurisdiction of the Court.—That was held to be a bad plea. There is no allegation in that plea that he had not in fact been served, or had notice of the action, nor does it allege that he was not for some reason or other bound to obey the judgment of the Court. It certainly does not seem to me to be a judgment upon the main point in question, nor was it contended that it was so, but it was relied upon for an expression of opinion of Mr. Justice Blackburn, who says in the course of the argument: "He says he never owed allegiance to the country. Besides, how could his appearance have rendered the judgment binding upon him under the circumstances stated?" It is a *dictum* which is undoubtedly in favour of the defendants. It does not appear to me to amount to more, and I think upon all ordinary principles I am bound by the actual decision, and that I have no right to question it merely because of a *dictum* so expressed in the report of the case.

The case of *Schibsby v. Westenholz*, however, is of considerable importance in this case upon another point, because it discusses the reason why a defendant in an action upon a foreign judgment is or is not bound to submit to the judgment, and states that the reason is "that the judgment of a Court of competent jurisdiction over the defendant imposes a

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duty or obligation on the defendant to pay the sum for which judgment is given, which the Courts in this country are bound to enforce, and consequently that everything which negatives that duty and forms a legal excuse for not performing it is a defence to the action." The applicability of the words to this case I will discuss presently, but it appears to me that upon the first question the matter is concluded by authority, and that it is the law until altered by competent authority, that where a defendant appears in the foreign Court, and takes his chance of a judgment in his favour, although he appears in consequence of the duress of wishing to protect his property there, which is in the hands of the Court, or which will become liable to seizure in case he does not appear, he cannot afterwards say that he is not bound to submit to a judgment obtained under those circumstances. I cannot myself see why in principle there should be any difference between a case in which the object is to protect the property actually seized, or to preserve property which may become subject to seizure from being liable. It seems to me to stand upon the same footing, and I come to the conclusion upon this point that really the case of the *General Steam Navigation Company v. Guillou* is no longer law, and that upon the authorities I am bound to hold that the mere fact that the defendant appears under those circumstances does not exempt him from the duty of obeying the judgment of the Court if he has once submitted to its jurisdiction.

(His Lordship then went fully into the facts of the case, and held that the judgment had been obtained under circumstances so contrary to "natural justice" that the Court would not enforce it against the defendant.)

Judgment for the defendant.

N. Argles.

G. H. Hall.

HUDDLESTON, B., and a S. J.

SOCIÉTÉ FRANÇAISE DES ASPHALTES v.
FARRELL.1885.
July 1.

THIS was an action of slander.

The plaintiffs were an asphalte company, and manufacturers of that article. The defendant was the secretary of Claridge's Asphalte Company.

The plaintiff company had laid down some asphalte roofing on some houses for one Bird, and had guaranteed the work for ten years. After the work was done, the defendant saw Bird on Bird's premises, and said to him, with reference to this work, "You will regret ever using the rubbish put on by others as asphalte; it is only Trinidad rock, and not asphalte at all." In consequence of this, Bird refused to pay for the work done, though he was quite satisfied with it.

The wrongful refusal of a third party to fulfil a contract may give a right to special damage for a slander, if such refusal be the probable consequence of the utterance of the slander.

Finlay, Q.C., and *Albert Gray*, for the plaintiffs.

Kemp, Q.C., and *Gore*, for the defendant.

Vicars v. Wilcocks, 8 East, 1; and *Lynch v. Knight*, 9 H. of L. Cas. 577, were cited.

HUDDLESTON, B., left the following questions to the jury:—

1. Were the words used?
2. If so, do they in their natural sense impute that the plaintiffs carried on their business improperly, or do they only convey an imputation on the article sold?
3. If they convey an imputation on the article sold, then were they used maliciously?
4. If they were used maliciously, then was there any special damage resulting from their use?

As to the special damage, his Lordship told the jury to consider whether it was the obvious intention of the defendant, or the probable result of his words, to induce Bird not to pay for the work.

The jury found that the words were used, that they were

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only used of the article sold, that they were not used maliciously, and that there was no special damage.

Verdict and judgment for the defendant.

Stibbard, Gibson & Co.

H. P. Cobb.

“To make the words actionable by reason of special damage the consequence must be such as, taking human nature as it is, with its infirmities, and having regard to the relationship of the parties concerned, might fairly and reasonably have been anticipated and feared would follow from the speaking of the words, not what would reasonably follow, or we might think ought to follow.” *Per Lord Wensleydale, in Lynch v. Knight*, 9 H. of L. Cas. 577. See, too, the remarks in Starkie on Slander and Libel, p. 205 (2nd edit.).

DAY, J., and a C. J.

JEWSON v. GATTI AND ANOTHER.

1885.
July 22.

There is no duty on the part of the occupier of premises to render them secure for persons using them without invitation for their own gratification.

ACTION for damages for personal injuries through alleged negligence of defendants.

The defendants were the owners of a cellar abutting on the public road, with an opening flush with the line of buildings, and on a level with the pavement. Across the opening was a bar, insecurely fixed.

The plaintiff, a child, attracted by seeing painting going on in the cellar, went up to the opening, and put her hand on the bar. The bar gave way, and the child fell through into the cellar and was injured.

Robson for the plaintiff.

Willis, Q.C., and Rosenthal, for the defendants.

DAY, J.—The defendants, no doubt, were under a duty to passers-by using the road to keep this opening safe and secure; but they were under no such duty to any one going up

to the opening and leaning on the bar for the purpose of seeing what was going on inside. The plaintiff must, therefore, be non-suited.

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E. B. Tattershall.

A. E. Rosenthal.

WILLS, J.

NOTTINGHAM PATENT BRICK AND TILE COMPANY
v. BUTLER.

1885.
May 20.

THIS was an action to recover a deposit of 610*l*.

Sir F. Herschell, S.G., Mellor, Q.C., and R. M. Bray, for the plaintiffs.

Charles, Q.C., and W. Graham, for the defendant.

The facts and arguments fully appear in the judgment.

WILLS, J.—The plaintiffs sue the defendant to recover the sum of 610*l*. paid by the plaintiffs to the defendant as a deposit upon the intended purchase by the plaintiffs from the defendant of a piece of land.

The land in question was put up for sale by auction on the 28th of September, 1882, but was not sold at the auction. Immediately afterwards the plaintiffs, by their solicitor, Mr. Hinde, entered into negotiations, first with the auctioneer, and then with the defendant himself, in the course of which the defendant told Mr. Hinde that there were restrictive covenants applicable to the land which would prevent its being used as a brick-field. The defendant's solicitor, Mr. Gilbert, who was present, was appealed to by Mr. Hinde

Where the same vendor selling to several persons plots of land parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matter of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. In

the former case purchasers of other plots of land from the vendor cannot claim to take advantage of them. In the latter, such purchasers and their assigns may enforce them *inter se* for their own benefit; and where a vendor desires to sell at an auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers.

A. sold to B. land subject to restrictive covenants, which would have been enforceable against B., if he had completed the purchase, by purchasers of other plots. A. knew of some of these restrictions, and had the means of knowing all. The land was sold under conditions of sale, providing: (1) That the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. (2) That any error or omission in the particulars, or these special conditions, should not annul the sale, or entitle the purchasers to compensation. The conditions of sale did not refer to the restrictive covenants.

Held, that B. was not precluded by the conditions of sale from repudiating the contract, and that sect. 3, sub-sect. 3 of the Conveyancing Act, 1881, had not altered the law in this respect.

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as to whether this was correct. He replied that he was not aware of any; thereupon the defendant said he had seen the restriction in one of the old deeds. And upon Mr. Hinde repeating his appeal, Mr. Gilbert again answered that he was unaware of any restrictions. Mr. Gilbert did not add that, without which his answers were misleading, viz., that he had not read the earlier deeds and knew nothing of their contents.

One of the directors of the plaintiffs' company who was present thereupon signed on behalf of the plaintiff company a contract to purchase the piece of land at the price of 6100*l.*, and a deposit of 10 per cent. was paid to the defendant. The contract contained a description of the piece of land proposed to be sold, but was silent as to its being subject to any restrictions upon the full proprietary rights of the purchaser of a freehold, and also contained the following conditions:—

"4. The property is sold subject to all tenancies, tenant rights, chief and other rents, tithe, rights of way, water, light, and other easements, and also to an arrangement entered into with the Nottingham Waterworks Company, for removing from time to time and laying down along the private road called Plains Road new main water-pipes, and also to the payment of a rateable proportion of the expense of keeping the said private road and gate at the end thereof next Mapperly Plains in good condition, and also subject to any matter or thing affecting the same, whether disclosed at the time of the sale or not."

"10. The title shall commence with an indenture of conveyance dated the 20th day of May, 1868, and made between Henry Conway Barnett, of the first part, Harriett Maltby, spinster, of the second part, and William Windley, of the third part."

"12. The property is believed to be, and is to be taken to be correctly described, and any incorrect statement, error, or omission found in the particulars, or these special conditions, is not to annul the sale, nor entitle the purchaser to be discharged from his purchase, nor is the vendor or purchaser to claim to be allowed any compensation in respect thereof."

About the 9th of December, 1882, the plaintiffs discovered that the property so bought was one of a number of bits of land which had, in the years 1865, 1866, and 1867, been sold by the same vendor to different purchasers, subject in

each case to conditions imposing restrictions on the cost and details and construction of any house to be built upon the land bought, and forbidding the use of it for various purposes of trade or manufacture, and especially as a brick-yard or for making bricks.

The plaintiffs thereupon, after some correspondence, of which it is unnecessary to go into the details, threw up the purchase, and brought this action to recover the deposit which they had paid.

I will dispose at once of the conversation which preceded the signing of the contract. Assuming that the land was subject to the restrictions in question, I think the conduct of Mr. Gilbert would have been sufficient, if the defendant were responsible for it, to have avoided the contract altogether. The evidence for the plaintiffs put it in a light still less favourable than the version I have given, and which is that narrated by Mr. Gilbert himself; but it is not necessary to discuss the discrepancies upon this point.

Upon his own showing Mr. Gilbert's answers were disingenuous, and could not fail (if relied upon) to mislead the plaintiffs—and had they been given by the defendant I should have had no hesitation in saying that a contract so procured could not stand. But both sides are agreed that the defendant himself was perfectly honest in the matter, and told all that he knew about the restrictive conditions, and under the circumstances, it is impossible to treat Mr. Gilbert as the agent of the defendant to make the statements in question, whether Mr. Gilbert's version or Mr. Hinde's be adopted.

The conversation, therefore, seems to me to leave the matter just where it would have been had no such conversation passed.

The contract, having been signed, speaks for itself: and defines the rights of the parties, and whatever might be the effect of the notice thus given to the intending purchaser of the restriction as to the use of the land as a brick-field, it is clear that no mention was made of the other equally material restrictions, and it is also clear upon the evidence that until the beginning of December, 1882, the plaintiffs had neither knowledge nor notice of them.

It appeared that the plot in question (containing about 6½ acres) was part of a property of about 42 or 43 acres,

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which was on the 24th of March, 1865, put up for auction in 13 lots. Amongst the conditions of sale were the following:—

“15. All buildings to be erected on any part of the said lands shall be stone-coloured with slated roofs; and no building to be occupied as a public-house, or workshop, or blacksmith's shop, or as a butcher's shop or slaughter-house, or chandler's house or shop, or as a shop for the sale of any article whatsoever, or for the purpose of using, working or making any article of manufacture therein shall be erected or built or so used upon any part of the land now offered for sale, nor shall any part thereof be used as a brick-yard or for the making of bricks, except Lot 13, and, in case the property shall be sold in lots, no house shall be erected on any part of the said land, except on Lot 13, at a less cost than 400*l*.

“16. The purchaser of the property, or of such lot in case the same shall be sold in lots, shall enter into all such covenants with the vendors as the vendors' counsel shall deem necessary or proper for securing the performance of these conditions on the part of such purchaser, which covenants shall be inserted in his deed of conveyance; and he shall also, in conjunction with the other purchasers (if any), enter into and execute a separate deed containing like covenants with the vendors, such separate deed being prepared at the expense of the vendors, but perused on behalf of such purchaser or purchasers respectively, and executed at his or their expense.”

At this sale Lots 1, 2, and 12 were sold.

In February, 1866, there was a second auction, at which Lots 6, 7, and 8 were sold.

In October, 1867, there was a third auction, at which Lots 9 and 10 were sold.

I am satisfied upon the evidence that the whole of these lots were sold upon the same terms. The solicitor and auctioneer who conducted the sale both believe that the conditions were the same. The solicitor who produced his bill book, containing an elaborate history of the dealings with the property, had in it no charge for altering the conditions on the occasion of the second or third sale.

The same person purchased Lots 1, 6, 7, 8, and 12; his

deed of purchase of Lot 8, sold at the second sale, and Lot 12, sold at the first sale, were produced, and both contained the restrictive covenants in question.

The deeds of purchase of Lots 9 and 10, sold at the third auction, were also put in, and they contained the same covenants.

Lot 2 was sold at the first auction, but there was no direct evidence of the terms of the conveyance.

Lots 3, 4, and 5 were sold in 1865, 1866, and 1867 by private contract to various purchasers, and there was no evidence as to the terms upon which they were sold.

Lot 11 (the lot contracted to be purchased by the plaintiffs in 1882 and now in question) was sold by private contract, and the deed of sale, bearing date 4th September, 1866, contained the restrictive conditions.

Lot 13 was sold by private contract in June, 1866, and the deed by which it was conveyed contained, with the exception of a permission to build a blacksmith's shop, such of the restrictions as were applicable to Lot 13. That lot was then a brickfield, and the permission to build a blacksmith's shop was, under the circumstances, a matter of the smallest possible consequence to any person interested in the observance of the restrictions.

I entertain, therefore, no doubt that the whole of the lots sold at the three auctions were sold subject to the restrictions in question, as well as Lot 11 and, with the modifications of them above mentioned, Lot 13, both of which were sold by private contract; and as to Lots 8, 9, 10, 11, 12, and 13, the matter was placed beyond a doubt by the production of the deeds by which the common vendor conveyed to the various purchasers. Some of the persons who had bought from the original vendor were shown to have resold without any restrictions being mentioned in the deeds by which they conveyed to their respective purchasers. Lots 2 and 3, part of Lot 4, and Lot 11 were shown to have been so dealt with. On the other hand, Lots 8, 9, 10, and 12 were shown to have been sold by every successive vendor by deeds containing the restrictions; and it appeared that every house that has been built upon any part of the original estate conformed to the covenant as to cost, and in part to the covenant as to colour, that is to say, the fronts of all the houses have been white,

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though in some instances the backs, and in many instances the stables, have been red.

No shop or building for manufacture has been put up on any of the lots, and none has been used as a brickfield. Most of the houses have been slated.

Under these circumstances the plaintiffs contended that they were not bound to complete their purchase—that they had bought a property which was in fact subject to serious restrictions upon its profitable use by a contract which contained no reference to the restrictions, and that there was nothing in the contract to prevent them from taking advantage of this objection.

On behalf of the defendant it was argued that there were no restrictive conditions applicable to the property bought by the plaintiffs, and that if there were the plaintiffs were precluded by the conditions cited from raising the objection, and it was said that this contention was supported by the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), s. 3, sub-s. 3.

Three questions appear to me to arise—1st. Whether the plaintiffs, as purchasers, were bound by the restrictive covenants contained in the deed of 4th September, 1866, which was the root of the defendant's title. 2ndly. Whether there was any one entitled to enforce those covenants against them; and 3rdly. Whether the plaintiffs were precluded by the conditions of their contract from insisting upon the objection.

Upon the first question it appears to me to be abundantly clear upon the authorities that a purchaser with notice of such restrictive covenants is bound by them. The cases are collected in *Dart on Vendors*, 5th edit., p. 767, and to them may be added *Hart v. Wilson*, L. R. 1 Ch. App. 463, and *Patman v. Harland*, 17 Ch. D. 353. Indeed this point was hardly seriously contested in the very able argument of Mr. Charles.

The second presents much more difficulty—was there any one in the present case entitled to enforce as against the plaintiffs had they become the purchasers of Lot 11 the restrictive covenants in question.

The principle which appears to me to be deducible from the cases is that where the same vendor selling to several persons plots of land parts of a larger property exacts from

each of them covenants imposing restrictions on the use of the plots sold. Without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matters of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. If the restrictive covenants are simply for the benefit of the vendor, purchasers of other plots of land from the vendor cannot claim to take advantage of them. If they are meant for the common advantage of a set of purchasers, such purchasers and their assigns may enforce them (*inter se*) for their own benefit. Where, for instance, the purchasers from the common vendor have not known of the existence of the covenants, that is a strong if not a conclusive circumstance to show that there was no intention that they should enure to their benefit.

Such was the case in *Keats v. Lyon*, L. R. 4 Ch. App. 218; *Master v. Hansard*, L. R. 4 Ch. D. 718; and *Renals v. Cowlishaw*, L. R. 9 Ch. D. 125; 11 Ch. D. 866. But it is in all cases a question of intention at the time when the partition of the land took place, to be gathered as every other question of fact, from any circumstances which can throw light upon what the intention was (*Renals v. Cowlishaw*, L. R. 9 Ch. D. 125, 129). One circumstance which has always been held to be cogent evidence of an intention that the covenants shall be for the common benefit of the purchasers is that the several lots have been laid out for sale as building lots, as in *Mann v. Stephens*, 15 Simon, 377; *Western v. Macdermott*, L. R. 2 Ch. App. 72; *Coles v. Sims*, Kay, 56; 5 D. M. & G. 1; or, as it has been sometimes said, that there has been a "building scheme" (*Renals v. Cowlishaw*, 11 Ch. D. 866, 867). In some instances the exhibition to intending purchasers of a plan embodying such a scheme has been relied upon; obviously, however, this is a mere detail of evidence, and is by no means necessary in order to establish the existence of such a scheme.

It appears to me that where land is put up to auction in lots, and two or more persons purchase according to conditions of sale containing restrictions of the character of those under consideration in the present case, it is very difficult to

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resist the inference that they were intended for the common benefit of such purchasers, especially where the vendor proposes (as in the present case) to sell the whole of his property. Where he retains none, how can the covenants be for his benefit; and for what purpose can they be proposed, except that each purchaser, expecting the benefit of them as against his neighbour, may be willing on that account to pay a higher price for his land than if he bought at the risk of whatever use his neighbour might choose to put his property to? Where, therefore, the vendor desires to sell at the auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers, and it seems to me that the strength of this evidence is not diminished by the fact that at the sale a considerable number of the lots may fail to find purchasers. In the present instance the vendor put up the lots for sale by auction three times, and always on the same conditions. Is it possible to doubt that he intended and that the purchasers understood that the covenants should enure to the benefit of every purchaser?

The inference is strengthened in this case by the fact that so far as has been ascertained one way or the other the purchasers by private contract of the lots not sold by auction were, with an exception so trifling as hardly to be worth notice, put under the same restrictions, and by the fact that the most important of the restrictive covenants have for nearly twenty years been observed by the several purchasers and their assigns. In *Western v. Macdermott* (L. R. 2 Ch. App. 72), very little weight was given by the Lord Chancellor to the fact that in some minor particulars no one of the several purchasers had thought it worth while to insist upon the performance of the covenants, and so here I am not disposed to attach any importance to the fact that the covenants as to the colour of the buildings to be erected on the plots sold, and as to the slate roofing, have not been in all respects strictly adhered to.

I come to the conclusion, therefore, that these covenants were meant by the vendor to be for the benefit of purchasers generally, that certainly the purchasers at the several auctions, and probably all those who bought by private contract, were aware that the other lots were being sold or would be sold upon the same terms, and that they bought on the faith that

those conditions would be observed all over the property of the common vendor.

If so, the purchasers of most if not all of the thirteen lots comprised in the particulars of sale of 1865, other than Lot 11, were entitled to the benefit of the restrictive covenants entered into by the purchaser of Lot 11. It is clear upon the authorities that their assigns have the same rights as the original purchasers, and these were, therefore, persons who could have enforced against the plaintiffs, had they completed their purchase, the restrictive covenants in question. The plaintiffs, therefore, are *prima facie* relieved from the obligation to fulfil the contract, and it remains only to consider the third question, viz. :—

Whether the conditions of the contract preclude them from taking the objection?

The fourth condition provides that the property is sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. Such a condition, however, does not relieve the vendor from the necessity of disclosing any incumbrance and liability of which he is aware, but simply protects him if it should afterwards turn out that the property is subject to some burden or right in favour of a third person of which he is unaware. Dart on Vendors, 6th edit. p. 156.

It would be nothing short of a direct encouragement to fraud if a vendor were at liberty by a condition of this kind to sell a purchaser as an absolute and unburdened freehold a property which he knew to be subject to liabilities which would materially reduce its market value. In the present instance the vendor knew of some of the restrictions, and had the means of knowledge of all of them; and he cannot escape from the necessity of fairly disclosing them by omitting to make himself acquainted with his deeds, or by forgetting their contents. In honesty and in law alike he was bound to give the purchaser full and fair information what it was that he had for sale and was inviting him to buy; and, having failed to do so, he cannot insist upon the bargain procured by the suppression of material matters affecting the nature of the subject of sale. I entirely acquit the defendant of anything like intentional misconduct, but in the preparation of the particulars of sale he unfortunately relied upon his solicitor,

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who, as I cannot help believing, was under the mistaken impression that he could better the position of the vendor by abstaining from making himself acquainted with the contents of the earlier deeds in his possession and open to his perusal.

The 10th condition provides that the title shall begin with a deed of 20th May, 1868, subsequent to that which contained the restrictive covenants in question, it is clear, however, that such a condition does not preclude the purchaser from raising a well-founded objection to the title arising from facts which he has discovered from collateral sources, *Waddell v. Wolfe*, L. R. 9 Q. B. 515.

The 12th condition provides that any error or omission in the particulars is not to annul the sale, nor to entitle the purchaser to compensation. It is however settled law, that such a condition will not protect the vendor where the misdescription, being of such a nature as but for the condition would avoid the contract, is due to the wilful reticence or negligence of the vendor. Sugden, p. 28, Dart, 5th edit., 134. In *Heywood v. Mallalieu*, L. R. 25 Ch. D. 357, property had been sold under conditions practically the same as the three relied on by the defendant in the present case. The purchaser discovered that it was subject to an easement undisclosed by the particulars of sale: the vendor knew of the easement. It was held by Bacon, V.-C., that he could not insist upon the sale, and that the purchaser was entitled to recover the deposit he had paid. Upon the points now under discussion, *Heywood v. Mallalieu*, seems undistinguishable from the present case, and is a distinct authority in favour of the plaintiffs.

It was contended, however, that greater efficiency is given to conditions such as those which I have discussed by the Conveyancing Act of 1881. (44 & 45 Vict. c. 41), s. 8, sub-s. 3.*

* A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will or other document, dated or made before the time prescribed by law or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the

abstract furnished to the purchaser; nor shall he require any information or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced,

This enactment, however, is a mere legislative application to every sale of a condition of the same general character as those under discussion, and there can, as it seems to me, be no reason for giving to it a meaning which would amount to a legislative repeal of doctrines established at the date of the passing of that Act by numerous decisions and by the thoroughly settled practice of conveyancers. On the contrary, sub-s. 11 of the same section shows clearly that it was not intended to have any such effect, or to qualify the principles upon which the Courts were at that time in the habit of acting in granting or refusing specific performance in such cases.

I have come, therefore, to the conclusion that the plaintiffs are justified in refusing to complete their purchase, and entitled to a return of their deposit, and my judgment must be for the plaintiffs for the sum of 610*l.* and costs.

*Torr, Janeways, Gribble
& Oddie.*

*Aldridge, Thorn
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or noticed ; and he shall assume, unless the contrary appear, that the recitals contained in the abstracted instruments of any deed, will, or other documents, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other documents, so recited, and that every document so recited was duly executed, by all necessary parties, and perfected, if and as required by fine, recovery, acknowledg-

ment, enrolment, or otherwise.

Sub-sec. 11. Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the Court.

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June 2.

NORRIS *v.* CATMUR.

Where a landlord is under no liability to his tenant to repair the premises, and a sub-tenant of such tenant, as to part of the premises receives personal injuries, owing to the defective state of the premises, the landlord is under no liability to such sub-tenant.

THIS was an action to recover damages for personal injuries. In September, 1883, the plaintiff went with her daughter-in-law to reside in a house in Whitechapel as tenants of a Mrs. Wagland, who was a weekly tenant of the defendant. The plaintiff and her daughter-in-law paid the rent jointly. In April, 1884, the plaintiff went into a yard which was an appurtenance to the premises and used by all the tenants jointly, and received the injuries complained of through a piece of guttering from the roof falling upon her head. The landlord had repaired the premises, including the roof, in December, 1883, and after the accident had occurred he repaired the guttering. There was no evidence to show that the landlord knew of the unsafe state of the guttering other than could be inferred from the fact of the repairs done in December, 1883.

Waddy, Q.C., and *Crispe*, for the plaintiff, contended that the landlord was liable to compensate the plaintiff for the injuries she had received, as an implied contract by him to repair must be inferred from the fact that he had previously done so. They cited *Nelson v. The Liverpool Brewery Co.*, L. R. 2 C. P. D. 811; *Pretty v. Bickmore*, L. R. 8 C. P. 401; *Gwinnell v. Eamer*, L. R. 10 C. P. 658.

Cohen, Q.C. (Tatlock, with him) for the defendant, contended that this was not like the case of a stranger receiving injuries through the defective repair of premises. The plaintiff was either a tenant or living with a tenant of the defendant at the time of the accident. A landlord is under no obligation to a tenant to repair unless by virtue of some contract. In this case no action could have been brought by the plaintiff against the defendant to compel him to repair, therefore this action, which could only have been based upon such a contract, must fail. He cited *Gott v. Gandy*, 2 E. & B. 845, 23 L. J. Q. B. 1; *Robbins v. Jones*, 33 L. J. C. P. 1.

Waddy, Q.C., in reply.

HUDDLESTON, B. (his Lordship after referring to a recent unreported case of *Mills v. West*, tried before himself, and distinguishing that case from the present on the ground that in that case the injury was done to a mere stranger,) proceeded. "In the case of *Mills v. West*, the person injured was a stranger, but here it is a tenant or guest. Is there any evidence of a contract here by the landlord to repair? I can see none. It is clear to my mind that Wagland could have sustained no action against the landlord for non-repair. The plaintiff can be in no better position than Wagland. This case, therefore, appears to me to be distinguishable from *Mills v. West*, and the plaintiff must be non-suited."

Edward Clarke.

A. Francis.

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THIS was an action for 70*l.*, being two quarters' rent of certain premises up to September 29th, 1884.

By a building agreement made between the plaintiff and the defendant on the 9th of February, 1883, it was agreed that the defendant should immediately fence in a piece of land belonging to the plaintiff, in Peel Grove, Bethnal Green, in the County of Middlesex, consisting of 2 roods and 32 perches, and commence and continue to erect upon the land, and on or before the 25th of March, 1884, completely finish fit for use at his own expense, certain houses as in the agreement specified. The plaintiff agreed that on the houses being erected he would grant to the defendant a lease of the land for 99 years, to be computed from the 24th of December, 1882, at a yearly rent of 140*l.*, payable quarterly on the 24th of March, the 24th of June, the 29th of September, and the

A building agreement provided that A. should build houses on land within a specified time, and that on their completion B. would grant to A. leases of them. A. agreed to pay a specified rent to B. from the date of the agreement to the expiration of the leases. The houses were not built by the specified time, and before they were built, an Act of Parliament rendered their erection illegal.

Held, that A. was not relieved from his liability to pay the rent under the agreement. An agreement to build houses on a disused, unconsecrated, burial ground, necessitating the removal of some thousands of corpses, which removal would of necessity involve an outrage on public decency, amounting to an indictable offence, is illegal.

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25th of December, the first of such quarterly payments to be made on the 24th of June, 1883.

The land to the knowledge of both plaintiff and defendant was a disused burial ground. The defendant entered into possession of the land, but was unable to erect the houses thereon, as the Vestry and the Metropolitan Board refused to give their sanction to the proposed buildings and street through the land, not being satisfied that there was or could be any effective system of drainage and sewerage for the houses. The houses were not built by the 25th of March, 1884, and on the 14th of August, 1884, the houses being still unbuilt, the building of houses on the said land was forbidden by Act of Parliament (47 & 48 Vict. c. 72).

The defendant paid into Court the proportionate part of the rent up to the 14th of August, 1884.

The evidence showed that the land had been used as an unconsecrated burial ground between 1841 to 1855, that during that period about 18,000 persons had been buried there, the graves being about 25 feet deep, and containing about twelve adults, or twice as many children in each grave, and the coffins being placed within four feet of the surface. When the ground was used for burial, persons were invited to bury their relations there, because, they were told (among other reasons as to its eligibility), the corpses might always remain there. The burial ground was closed in 1855 by an Order in Council, and had not since been used.

The evidence further showed that the coffins were, in 1883, partly rotten and partly not rotten, and that the corpses were in various stages of decomposition. Evidence was also called as to the impracticability of building on the land without removing the coffins and corpses, owing to the danger of subsidence.

Lumley Smith, Q.C., and *Channell*, for the plaintiff, contended that as the defendant had agreed to build the premises by the 25th of March, 1884, and had failed to do so, the *subsequent* illegality created by Act of Parliament, did not relieve him from his obligation to pay the rent, the plaintiff having performed his part of the contract, and given possession of the land. Further, the houses might have been built in concrete, or the corpses might have been decently removed.

Gainsford Bruce, Q.C., and *W. Graham*, for the defendant, contended that no rent subsequent to the date of the Act of Parliament was payable, as the whole object of the agreement had failed. Further, the agreement was illegal from its very inception, as it could only be carried out by removing the corpses which would necessarily involve an outrage on public decency.

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The following authorities were cited: *Paradine v. Jane*, Aleyn, 27, Sty. 47; *Rex v. Duffin*, Russell & Ryan's Cr. Cas. 866; *Baily v. De Crespigny*, L. R. 4 Q. B. 180; *Reg. v. Jacobson*, 14 Cox C. C. 522 Q. B. D.; *Rex v. Lynn*, 2 T. R. 738, 1 Leach C. C. 497; *Foster v. Dodd*, L. R. 3 Q. B. 67.

DAY, J.—This is a case which has presented to me a great deal of difficulty. I will deal with the various points, as far as may be, in the order in which they have been raised.

Now the agreement is an agreement entered into on the 9th of February, 1883, whereby the plaintiff agrees to grant a lease for 99 years to the defendant upon the defendant completing the erection of certain houses upon this piece of land to the satisfaction of the plaintiff, and of the value of 4,000*l*.

The defendant undertakes to take such lease, to build the houses, and in the meantime to pay the stipulated rent of 140*l*. per annum. He is to pay the same rent before he gets the lease, and he undertakes, until the leases are granted, to pay the rent.

The houses are to be built, and the leases to be granted on or before the 25th of March, 1884. In August, 1884, an Act of Parliament is passed which makes the building of any houses on this land illegal. The land is land which was a disused graveyard. It was one of those speculations which used to be carried on, and may be, for aught I know, carried on still in burials, and was opened, as I understand, in 1841. They ceased to bury in it in 1855, and in the meantime, in this very small bit of land, according to the calculation made by one of the witnesses, they had succeeded in stowing away 17,000 to 18,000 corpses, putting ten to twelve adults, or twice as many children, into one grave. Having put those 17,000 or 18,000 bodies into this piece of ground, they let the ground lie until 1883, and then, when the ground is still festering with this corruption, the coffins still remaining

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intact, they think the time has arrived to let it out as an eligible building estate, and accordingly this agreement is entered into.

Fortunately the Metropolitan Board appear to have been vigilant, and active, and successful, and they got this beneficial Act of Parliament passed in time to prevent the work being carried out.

Now the question is, who is to bear the loss?

The plaintiff says: I have let this land—at least I have entered into an agreement to let the land. If the defendant had fulfilled his contract, and had put the houses up within the time in which he stipulated to put them up, this would not have fallen within the mischief provided against by this Act. I should have had a well-secured rent of 140*l.* a year; houses would have been put upon it, and I should have been in the receipt of a well-secured income.

The defendant says: True, that would have been the case; you may have a remedy against me for not putting up the houses within the time provided; if you had brought any such action as that, I should have had my defence, and I should have endeavoured to show, and perhaps succeeded in showing, I was excused from putting them up within the time; in that case I should not have been liable to make any compensation for the loss which you, the plaintiff, might have sustained; the loss must have fallen on you.

Now, what was the position of the defendant? he was not the lessee of the land. He was merely the person who had agreed to put up houses, to take a lease of those houses, and in the meantime to pay what is called a rent of 140*l.* a year.

The defendant says: "I am not bound to pay this rent now, because I may not build; it would be unlawful on my part, by reason of the interposition of the Legislature, to put up those houses; I should be violating the law if I did so, and I am excused from putting up the houses."

Now the question is, Is the defendant excused from paying this stipulated rent? At first I thought the gist of the agreement was, putting up the houses. But I was very much pressed by the arguments urged upon me by Mr. Lumley Smith and Mr. Channell, that the object of the plaintiff was to get 140*l.* a year; secured by houses it might be, but if unsecured by houses, he was still to get 140*l.* a year. I do

not well see my way out of that difficulty that they have raised.

Here is an agreement to pay 140*l.* until the houses are built. It is true it has become impossible by the Act of the Legislature, and it would be illegal on the part of the defendant to put up the houses; but still, what is there illegal in his paying this 140*l.* a year? I do not see my way out of the plain words of the agreement. It is not for me to alter or make agreements for persons. I must take the words which they themselves use, and put the best construction I can upon them; and I come to the conclusion that this subsequent illegality does not relieve the defendant from his liability to pay 140*l.* a year. It is his misfortune, not the plaintiff's fault, that he has not got the houses built, and is not in a position to get rents from the tenants of the houses to recoup himself the money which he has undertaken to pay year by year to the plaintiff. It seems to me, therefore, that in this view of the case the loss would have to fall upon the defendant.

But another question is raised. It is said that the agreement itself is an illegal agreement, that the agreement was at the time it was made illegal, because the gist of it was to do that which was illegal. Now, of course, one is never to construe an agreement as illegal that one can construe as legal. One is never at liberty to impute illegality unnecessarily. Now if the defendant could without violating the law have put up these houses, then the agreement is certainly not an illegal agreement. It might have entailed vast expense upon him; it might have entailed a ridiculous expense upon him; but still if he could, whatever the expense, put up these houses on this land, the agreement was not an illegal agreement in my view. Now could he have done it? I am satisfied on the evidence that he could not have built on this ground without removing the bodies. I am satisfied that the parties must have known that the land could not have been built on without removing the bodies. I am perfectly satisfied no houses could be built (and as we know, according to law, it is not allowed) without drains and foundations. Drains and foundations could only be had by disturbing the ground of the cemetery. It is perfectly clear, I suppose, that no public body would allow drains to be run through a cemetery, or foundations to be laid in a cemetery full of decomposing

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human remains; and without the consent of such a public body it could not be done. It is suggested that the difficulty would be got over by concreting. I have come to the conclusion concreting would not have got over the difficulty. No public body would have allowed such a course to be taken. Therefore, it seems to me, the scheme was one which did necessarily involve the removal of these bodies. Was that a lawful thing to do? That bodies cannot be disturbed in consecrated ground is perfectly clear. There is no doubt the consecrated grounds were preserved and protected by the common law and also by the ecclesiastical law; but a difficulty arises, no doubt, with reference to the unconsecrated grounds. They are certainly not protected by the ecclesiastical law at all. They came into existence long after the common law upon the subject was, so to say, settled, within the last one, two, or at most three centuries; and they are not protected by the common law in the same way that consecrated grounds are.

But persons cannot invade unconsecrated grounds against the will of those persons who are interested in them; and, therefore, there have been many instances of convictions of body snatching in unconsecrated grounds. There are instances to be found of indictments, which have been properly upheld, against persons who have intruded themselves into unconsecrated grounds and disturbed the bodies reposing in them. Again, the remains of persons buried in unconsecrated grounds have other protection also. Public decency must not be outraged by any disturbance of bodies in unconsecrated ground, and that is admirably illustrated in the case in which the judgment of Mr. Justice Field has been read, of the Whitfield Burying Ground in the Tottenham Court Road. There is no doubt that persons who lawfully or unlawfully remove bodies from unconsecrated grounds must take very good care to do so, so as not to outrage public feeling, or to insult the common feeling of their neighbours and fellow-men. Persons who remove bodies must take care to do so without any violation of public decency. Then probably, persons having legitimate reasons may lawfully remove bodies. No doubt faculties, which are only applicable to the removal of bodies in consecrated grounds, cannot be obtained, but persons may remove bodies for the purpose of depositing

them elsewhere. Persons who remove bodies under such circumstances will remove them with propriety and decency, and not outrage public decency. Persons who remove them for the purpose of putting up buildings, and remove them in the indecent way in which it was done in the case of the Whitfield Burying Ground, are liable to be indicted, not directly for the outrage on the ground or the remains of the deceased, but for the outrage on the feelings of living persons by treating the remains of the deceased with indecency and impropriety. Therefore, in this case, these bodies might have been removed, if it could have been done with propriety, but the thing is too absurd to contemplate. One cannot imagine a speculative removal of 17,000 to 18,000 bodies, or whatever may be the number of bodies remaining; one cannot imagine the possibility of that being done without the grossest indecency.

Any scheme for the removal of a whole graveyard full of bodies necessarily involves, whatever pains are taken about it, a very grave and gross outrage of public decency. It seems to me a scheme for building in a place of this sort necessarily involves the removal of these bodies, and necessarily involves an outrage on public feeling, and therefore the people doing it might be committed for an indictable offence. I also think an agreement between the man who has acquired the freehold of this cemetery and the builder who enters into a contract necessarily involving the removal of these bodies is an agreement by persons who combine together to disturb those vested rights which have been acquired by the persons who have paid for the burials in this place. I do not care to inquire whether they bought their grave in perpetuity or not. As far as the hand-bill is concerned, which has been put in by the reverend gentleman who was formerly chaplain of this cemetery, it would seem that graves were sold in perpetuity. That is immaterial. Persons who paid money for the deposit of their relatives or friends in that cemetery are entitled to have them lie there, and lie there undisturbed, or at least lie within the place with no other disturbance than such as is usual in places of public burial. If this agreement necessarily involved the disturbance of those bodies, then it was an agreement which in my judgment was an unlawful act. It was a combination or conspiracy to do that which violated

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the rights of others, therefore it would be as such an indictable offence.

That being the view I take of this case, therefore, the agreement could not have been carried out; at the time when it was made it was an agreement incapable of being carried out without doing that which would be illegal. Therefore, in my judgment, it was an illegal agreement, and one which is consequently void.

That being my view, I give judgment for the defendant.

*Thomson, Brooks
& Son.*

*Collyer, Bristow, Withers,
Russell & Hill.*

DENMAN, J.

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May 17.

To render a person liable for a penalty, under 32 Hen. VIII. c. 9, s. 2, as the buyer of a pretended title to land since the statute 8 & 9 Vict. c. 106, it is necessary that the buyer should have known at the time of the sale that the title was a pretended or fictitious one. Proof that the buyer knew that the title bought was barred by the Statute of Limitations does not necessarily render the title a pretended or fictitious title within the meaning of the Statute 32 Hen. VIII. c. 9, s. 2.

THIS was an action for a penalty under 32 Hen. VIII. c. 9, s. 2.

Gully, Q.C., Smyly, and Lee Clare for the plaintiff.

C. Russell, Q.C., A. T. Lawrance, and McClymont, for the defendant.

The facts sufficiently appear from the judgment.

DENMAN, J.—This action was brought in the Chancery Division, claiming on behalf of the plaintiff the sum of 5,000*l.*, as being one half of the value of certain property in Manchester, by virtue of the statute 32 Hen. VIII. c. 9, sec. 2. That statute, after reciting, “that the true and indifferent trial of such titles as been to be tried is let and hindered by (amongst other things) buying of titles and pretended rights of persons not being in possession,” enacted by sec. 2 as follows: “that no person shall from henceforth bargain, buy, or sell, or by any ways or means obtain, get, or have any pretended rights or titles, or take, promise, grant, or covenant to have any right or title of any person or persons in or to any lands, &c. (except such person or persons which shall so bargain, sell, give, grant, covenant, or promise the same, their ancestors or they by whom he or they claim the same, have been in the possession of the same or of the reversion or remainder thereof or taken the rents or profits thereof by the space of one whole year

next before the said bargain, covenant, grant, or promise made), upon pain that he that shall make any such bargain, sale, promise, covenant, or grant, to forfeit the whole value of the lands, &c., so bargained, sold, promised, covenanted, or granted, contrary to the form of this Act; and the buyer and taker thereof *knowing the same* to forfeit also the value of the said lands, &c., so by him bought or taken as is above said, the one half of the said forfeitures to be to the King, and the other half to the party who will sue for the same in any of the King's Courts of Record by action of debt, bill, plaint, or information."

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The land in question had belonged to one Lawrence Buchan. He died in 1859, leaving the property in question to one Ann Duncan. The plaintiff in the present action, during the life of Ann Duncan, received the rents of the property, which consisted of a mill and several cottages in Manchester, and accounted for them to her from time to time, making disbursements for rates and insurance and other similar charges out of the rents, and charging them and the expenses of collection, in the accounts rendered to Ann Duncan, who lived in Scotland upon other property to which she had succeeded upon the death of her brother George in 1865. This property had been left to George Duncan by Lawrence Buchan. In 1867 Ann Duncan died intestate as to the land in question, but leaving a will as to her personalty and as to the Scotch estate.

Since that time down to the present the rents of the land in question have in fact been received by the plaintiff, but on many occasions when different persons have informed the plaintiff that they themselves or others on whose behalf they wrote claimed or stated that they believed themselves to be heirs-at-law of Ann Duncan, the plaintiff wrote letters to the effect that the property was safe in his hands for the heir as soon as his title could be proved. Amongst others, the defendant Lyell, having in 1869 intimated that he believed that he was the heir of Ann Duncan, received a letter from the plaintiff on the 15th of January, 1869, in which is the following passage, "I can assure you that if you are Miss Duncan's heir you will have no difficulty with me. The rents are all placed in the bank as they accrue, and regular accounts kept." In fact the plaintiff paid the rents into a bank to the account of the executors of Miss Duncan, and the receipts for rates

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and insurance and outgoings were generally taken in the name of the executors of Miss Duncan.

In March, 1880, the defendant commenced an action against the plaintiff before V.-C. Malins to recover the property in question, asserting that he was heir-at-law to Ann Duncan, being heir to his father who died in 1869, and who, as he alleged, was the great grandson of Elizabeth Lyell (born Cunningham), who was a sister of Ann Duncan (born Cunningham), the paternal grandmother of the intestate Ann Duncan. The plaintiff (Kennedy) in affidavits filed in that action set up that Ann Duncan (born Cunningham), the intestate's paternal grandmother, had a brother Andrew, who had a descendant George, still alive, who was the son of Major-General John Cunningham. In one of these affidavits used by the plaintiff it was sworn by the deponent Moncrieff, a writer at Perth, that Major-General John Cunningham's father had three sons, George, Lawrence, and John; this affidavit was sworn on the 22nd of May, 1880. On the 6th July, 1880, the present defendant discontinued his action, and on the 24th December, 1880, he entered into the transaction in respect of which the present action is brought, on the ground that it was the buying of a pretended title within the 92 Hen. VIII. c. 9, s. 2. The deed of purchase was between Eleanor Bradock, widow, of the first part, Catherine Cunningham, spinster, of the second part, and Isabella Cunningham, spinster, of the third part, and the defendant, of the fourth part. It recited the death of Ann Duncan, intestate, as regards the property in question in 1867, "leaving, as is believed, the said Eleanor, Catherine, and Isabella, her co-heirs-at-law, who have agreed with the said David Lyell for the conveyance and assignment to him of all their estate and interest in the lands," and witnessed that in pursuance of the said agreement in consideration of 5s. then paid by Lyell, they and each of them thereby granted, released, and conveyed to him and his heirs and assigns, all their and each of their estate and interest in the lands of or to which Ann Duncan was at the time of her death seised, possessed, or entitled at law or in equity, and to which upon her death the said Eleanor, Catherine, and Isabella became entitled as her co-heirs-at-law, and all the right, estate, title, interest, property, possession, claim, or demand whatsoever both at law and in equity of them and

each of them in, to, out of, and upon the said lands, &c., and premises." And they also assigned to him all their interest in the rents and profits accrued due since the death of Ann Duncan. The deed also contained a covenant for further assurance.

On the same day (the 24th December, 1880), the defendant gave the plaintiff notice of the deed and its purport, and called upon the plaintiff to deliver up to him possession of the estate and account for the rents and profits now in his hands, and gave notice that in default he would commence legal proceedings, adding the following words: "I may mention that the aforesaid ladies are the only remaining descendants of George Cunningham, the eldest brother of the late General Cunningham." The George Cunningham so mentioned would be the same person spoken of in Moncrieff's affidavit above referred to, used by the plaintiff and sworn on the 22nd of May, 1880, and if that George Cunningham had issue living, their title would be prior to that set up by the defendant in the action which he discontinued on the 6th July, 1880, before taking the conveyance of December from the three ladies. On the 4th of January, 1881, the defendant brought a second action, founded on the deed of 24th December, 1880, which action is still pending, in which he alleges that the three conveying parties to that deed are coheirs of Ann Duncan, and claims that the present plaintiff should be ordered to give him possession of the premises, and that accounts of the rents should be taken, and for a receiver.

The present plaintiff in order to prevent further litigation at the suit of the defendant brought the present action on the 21st of June, 1881. And since that time both cases have given rise to much litigation upon interlocutory questions as to the right to interrogate and to have discovery of documents.

On the argument before me both parties largely referred to *dicta* of the several learned Lords and other Judges who have had to dispose of the questions raised in those interlocutory proceedings, and I have carefully read the reports of those proceedings; but I can find nothing in any of those *dicta*, nor any decision which enables me to decide this case on the ground that it is either *res judicata*, or even that any strong opinion has been expressed upon the points upon which, in my opinion, its decision must turn.

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The sole question in the case appears to me to be whether the defendant at the time at which he signed the deed of the 24th of December, 1880, incurred by signing it the penalty imposed by sect. 2 of 32 Hen. VIII. c. 9. The plaintiff contends that he did. The defendant that, since 8 & 9 Vict. c. 106, whatever might have been the case before, no forfeiture can be incurred unless the purchaser knows that he is purchasing not merely a mere right of entry with the knowledge that the seller has not been in possession for one whole year, but a fictitious title; and that in this case there was no evidence of any such knowledge on the part of the defendant at the time of the purchase. There can be no doubt that down to 8 & 9 Vict. c. 106, the sale of a right of re-entry, whether the title sold were good or bad, and where the seller or those under whom he claimed had not been in possession for a whole year, was within the statute, and incurred the forfeiture (see *Goodwin v. Butcher*, 2 Mod. 67); and that the transaction itself was void. The latter point was expressly decided in *Doe d. Williams v. Erans*, 1 C. B. 717. But even before 8 & 9 Vict. c. 106, in the case of an action or information against the buyer of such a right for the penalty of the statute, it was essential that his knowledge of one matter at least should be alleged and proved, viz., that the seller or his predecessors had in fact not been in possession for the required time, viz., one whole year next before the bargain; this appears very clearly from the several reports of the case of *Slywright v. Page*, which was an information upon the statute for taking a lease of one not in possession; the first report of it is that of the trial before a Sussex jury, ending in a special verdict, and is in Goldsborough, p. 101. It is clear from that report and the subsequent one at a later stage in Leonard, p. 166, that the law was as stated by Anderson, C.J.: "If a man hath not been in possession and cometh to me, and saith that he will make me a lease; if I do not know that he hath not been in possession, I am not within the statute." The concluding words in the report in Leonard are, "And note in this case it was holden by the justices that of necessity it ought to be found by the verdict 'that the defendant, knowing that the lessor never had been in possession,' which I apprehend clearly means in possession for the period required by the clause in its excepting words."

This being the state of the law down to 1845, the Act of 8 & 9 Vict. c. 106, was passed in that year, by sect. 6 of which rights of entry were made alienable by deed; the effect of this provision upon 32 Hen. VIII. c. 9, was much discussed and partially decided by the Court of Appeal in the recent case of *Jenkins v. Jones* (L. R. 9 Q. B. D. 128); but it was not the case of an action for penalties against the buyer of an alleged pretended title, but only raised the question whether an action brought upon a covenant for title could be maintained, such covenant being contained in a deed, the only objection to which was that neither the defendant, nor any person through whom he claimed, had been in possession of the lands or the profits for one whole year next before the execution of the deed, and that the plaintiff well knew this. The Court of Appeal, after taking time to consider, held that, though the statute of Henry VIII. was not repealed by 8 & 9 Vict. c. 106, yet, since the latter Act, a right or title could no longer be held to be a "pretenced" right merely by reason of non-possession, and that since the later Act a right or title good in fact, that is, not fictitious, is not a "pretenced" title within the former statute simply because it is a right of entry. This decision obviously leaves open the question whether, in order to make the buyer of a right of entry liable to the penalty of 32 Hen. VIII. c. 9, it is now sufficient to allege and prove merely that the title he purchases is a bad one, or whether, as it was necessary before to allege and prove his knowledge of the non-possession, so now it is necessary to show that when he purchased he knew the title to be "pretenced," *i.e.*, fictitious or bad in fact.

I am of opinion that it is necessary for the plaintiff to make this out, and that the *onus* lies on him to establish it. It would be such an entire departure from the first principles of the law relating to statutes imposing a penalty to hold that where a statute makes knowledge essential to the incurring of a penalty evidence of knowledge can be entirely dispensed with, that I think it would be necessary to hold that the statute is repealed so far as the forfeiture by a buyer is concerned, unless the words "knowing the same" can be applied to the statute consistently with any new statute qualifying the clause of the Act of Hen. VIII. by which the forfeiture is imposed. Mr. Gully maintained that such knowledge was established, be-

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cause in an affidavit made by the defendant on the 9th of June, 1880, before he discontinued his first action, he stated that he had caused certain records referred to in one of the affidavits used on the other side (which were not admissible in evidence) to be searched, and "had been informed and believed" that the said records contained no entries tending to show that Ann Cunningham had any brother Andrew, and yet he now claimed under an Andrew whom he alleged to be the brother of that same Ann. I am quite unable to see how evidence of this description tends to shew the knowledge of the defendant more than six months after that affidavit was made. It is a mere statement of information and belief, derived from others, and which may have been entirely displaced by inquiries made between June and December, 1880. Nor can I discover in the whole of the evidence given by the plaintiff any shadow of proof that the defendant had any knowledge of the existence of any heir of Miss Duncan nearer than the co-parceners at the time he took the conveyance in December, 1880. The case now relied upon by the plaintiff before me was not hinted at in any pleading or affidavit until long afterwards, and the plaintiff himself on many occasions in the course of the litigation with different parties expressed an opinion that the intestate had no heirs *ex parte paternâ* in existence. I think the plaintiff has wholly failed to discharge the *onus* of showing knowledge on the part of the defendant, that the title of the coparceners was fictitious by reason of any heir with a better title being still alive on the 24th of December, 1880, the date of the deed.

The other ground upon which it was contended that the defendant knew the title of the coparceners was fictitious was that he knew that the plaintiff had been in possession of the property for more than twelve years, and therefore had an indefeasible title by the Statutes of Limitations. As regards this contention, it was admitted by Mr. Gully that so far as one of the coparceners (Mrs. Bradock) was concerned, the statute had not run, because six years had not elapsed since the death of her husband (whom she married in 1855), and who died in 1876, and that her right was therefore alive in 1880, when she conveyed to the defendant, by sect. 3 of 37 & 38 Vict. c. 57. But beyond this, it was contended for the defendant that there were other conclusive objections to the

application of the Statute of Limitations, and I am of that opinion. According to the true view of the effect of *Jenkins v. Jones*, a title is not, I think, to be deemed fictitious or "pretenced" to the knowledge of a buyer in such a case as the present. It appears, from the evidence in this case, that until recently the plaintiff never affirmatively set up any right in himself adverse to the heir-at-law whenever he might be found. On the contrary, he constantly, to the defendant and to others setting up claims as heir, intimated his determination to hold and account for the property and rents for and to the heir as soon as he should make good his title, and in a letter to the solicitor for one of the claimants, as late as the 29th of October, 1879, when twelve years from Miss Duncan's death, on the 5th of November, 1867, were on the point of expiring, in answer to a passage in which the solicitor in question told him that counsel had said "I cannot believe Mr. Kennedy capable of taking advantage of the statute in his own favour, and to defeat the rights of the parties morally and legally entitled to the property," he answered, "Your counsel is quite right. Miss Duncan's property is quite safe for the person legally entitled to it." I do not find that this letter was communicated to the defendant, nor was there any express or implied promise to the defendant not to avail himself of the Statute of Limitations, nor do I find that the defendant or the coparceners were induced by any belief that it was impossible that the statute might be set up to delay prosecuting their own claims, but the plaintiff had on more than one occasion used expressions to the defendant as to his determination to manage the property for the heirs after Miss Duncan's death, as in the letters of 15th and 18th of January, 1869, referred to before, and there is a total absence of any assertion of absolute ownership or right inconsistent with the rights of the heirs, and of any personal taking possession of the property in order to set the statute running, as against the heirs.

I have come to the conclusion that the mere fact even if it be the fact that the right of the coparceners was statute barred at the time of the purchase, does not necessarily render it a "pretenced" or fictitious title within the statute of Henry VIII. c. 9, so as to make the buyer liable to an action for penalties. He only knows that the time has

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clapsed which will *enable* the party in possession to set up the statute. I apprehend that the party in possession might always refrain from setting up the statute, and it cannot be said, therefore, that the title is not one that may, since 8 & 9 Vict. c. 106, be honestly bought, in the hope that no such defence will be raised by the person in possession. On this ground alone I should decline to hold that the plaintiff has made out his case of knowledge on the part of the defendant that the title of the coparceners was "fictitious" or "pretenced" within the meaning of the judgment in *Jenkins v. Jones*, for I do not think that either of those words necessarily includes the case of a title in which, for aught that appears, the purchaser thoroughly believes, especially in a case where the person in possession has held himself out to the person sued for penalties as being solicitous to be considered as holding only for the heirs, whoever they may be. But the case was put still higher by the defendant's counsel; they contended that, looking at the evidence relating to the management of the property, and the statements of the plaintiff, his possession was in law the possession of the heirs throughout, and that his position was that of a mere manager or bailiff of the estate, first for Miss Duncan during her life, and afterwards for her heirs, who became seised upon her death. I must presume, and indeed it appears from the plaintiff's evidence, that the property was let to tenants at the time of Miss Duncan's death; and that the plaintiff from that time down to 1880 went on receiving the rents from the tenants and managing the property and charging the disbursements against the rents in his accounts precisely in the same way after Miss Duncan's death as before. That being so, I think that the case of *Bushby v. Dixon*, 3 B. & C. 298, applies, and shows that immediately upon her death the possession of the tenants became the possession of the heirs of Miss Duncan, and that it is impossible to point to any particular time at which the statute began to run in favour of the plaintiff, at all events before the date of the conveyance of the coparcener's title to the defendant. Until a period long within twelve years of the deed of December, 1880, he regularly paid the rents into an account not his own, and took receipts for outgoings not in his own name, and disclaimed altogether any intention of dealing with the property as his

own. I think, therefore, there was nothing to prevent the possession of the tenants from enuring to the benefit of the heir-at-law, or to make the taking of the rents and profits (professedly not for his own benefit, but for theirs,) a possession in him for the purposes of the Statute of Limitations. Looking at the whole case, I am of opinion that the contention of the defendant was right, and that the statute of Hen. VIII. does not apply, because there is no evidence that the defendant did not *bonâ fide* believe that the title of the coparceners was a perfectly good one, and not "pretenced" within the meaning of the statute of Hen. VIII. as modified by the statute of Vict. according to the decision in *Jenkins v. Jones*; and that there is no evidence that the plaintiff was in possession of the property as against the heirs-at-law, whoever they may be, for twelve years before the deed; nor that the possession of the tenants was not the possession of the heirs; nor that the plaintiff was ever in possession of the rents and profits of the property otherwise than as a mere agent or manager up to the date of the deed. Still less that any of these circumstances existed to the knowledge of the defendant.

I therefore give judgment for the defendant, with costs.

Judgment for the defendant.

Rooke & Sons.

J. Balfour Allan.

On the point as to the Statute of Limitations, conf. the judgment of Earl Cairns, L. C., in *Davkins v. Lord Penrhyn*, L. R. 4 App. Cas. at pp. 58, 59.

DAY, J.

FORD & SON v. METROPOLITAN AND METROPOLITAN DISTRICT RAILWAY COMPANIES.

1885.

July 2.

THIS was an action on an award made in respect of a claim by the plaintiffs against the defendants under the Lands Clauses Consolidation Acts for damage to the plaintiffs' leasehold interest in certain premises.

The interference with, or obstruction of, a private right of way to demised premises by the execution of works is an

interference with a right of property entitling the lessee to compensation under the Lands Clauses Consolidation Act, 1845.

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POLITAN
DISTRICT RAIL-
WAY COM-
PANIES.

The plaintiffs, wholesale tea-dealers, were the lessees under a lease for seven years, made in 1880, of three back rooms on the first floor of a house, No. 73, Great Tower Street, in the City of London, at a yearly rent of 180*l.* per annum, which they used as their London office. The sole means of access to these rooms was through a passage leading from the main street through other parts of the building to the demised premises, and the plaintiffs had a private right of way from the street to their rooms by this passage. The defendants, in the exercise of their compulsory powers of purchase for the purpose of the extension of their railways, purchased the buildings through which the passage ran. They did not purchase any part of the rooms demised to the plaintiffs, but in the execution of their works, which necessitated the pulling down of the buildings through which the passage ran, they interfered with, but did not shut off the access to the plaintiffs' rooms. After the completion of the defendants' works the access to the plaintiffs' premises was direct from the street, and not by the passage. The defendants attended the arbitration to assess the amount of compensation under the Lands Clauses Consolidation Acts under protest. The arbitrator awarded to the plaintiffs 600*l.*

One of the grounds on which defendants resisted payment of the amount of the award was that there had been no "injuriously affecting" the premises within the meaning of sects. 63 & 68 of the Lands Clauses Consolidation Act, 1845.

R. M. Bray (Murphy, Q.C., with him), for the plaintiffs.

Mellor, Q.C., and *G. M. Freeman*, for the defendants, referred to *Ricketts v. Metropolitan Railway Company*, L. R. 2 H. L. 175; *Duke of Buccleuch v. Metropolitan Board of Works*, L. R. 5 H. L. 418.

DAY, J.—The plaintiffs had a right of way. This was a right of property, for interfering or obstructing which the plaintiffs would clearly have had a remedy against their landlord, if he had interfered with or obstructed it. They are therefore entitled to compensation from the defendants. In *Rickett's Case* the interference was with a public not a private way.

Judgment for the plaintiffs.

Irvine & Hodges.

Burchella.

DENMAN, J.

TURNBULL v. GREAT EASTERN AND PENINSULAR
NAVIGATION COMPANY.

1885.

June 25.

THIS was an action by charterer against shipowner for damages for loss of a cargo shipped under a charter-party, the loss being due to the negligent navigation of the master.

One of the heads of damage claimed by the plaintiff was in respect of the enhanced value of the goods owing to the prepayment of freight in respect thereof.

The charter-party contained the following clause relating to the payment of freight.

"Freight to become due upon the due delivery of the cargo, and is to be paid upon the weight then so ascertained as follows, viz., at the rate of 16s. 6d. per ton of 20 cwts. on the quantity delivered to the consignees in Bombay, but four-fifths of the freight calculated on the quantity shipped to be advanced and paid in cash in one month from the steamer sailing from her last port in Great Britain (steamer lost or not lost), and the remainder found to be due to be paid in cash in Bombay less first cost and insurance of coal delivered of the quantity herein stated to have been shipped."

A charter-party provided as follows:—

"Freight to become due upon the due delivery of the cargo, etc., but four-fifths of the freight, calculated on the quantity shipped, to be advanced and paid in cash in one month from the steamer sailing."

The charterer duly paid this four-fifths, and afterwards the cargo was lost, owing to negligent navigation. Held, that the charterer was entitled to recover back this payment as damages for the loss of his goods, the value of which had been enhanced by its payment.

Barnes (C. Russell, Q.C., with him), for the plaintiff contended that damages were recoverable, the cargo being so much more valuable owing to the freight prepaid.

Sir Farrer Herschell, Q.C., and Bucknill, for the defendants, contended that what was prepaid was not really freight, but a sum paid to the shipowner in consideration of his receiving the cargo on board, and so was not recoverable. They cited *Kirchner v. Venus*, 12 Moore, P. C. Cas. 361.

DENMAN, J.—I think that what was prepaid was clearly, on the words of the charter-party, a prepayment of freight; and what the plaintiff lost owing to the defendant's negligence was really goods of a value enhanced by reason of that prepayment. The amount prepaid is therefore recoverable as damages.

Walton, Bubbs & Walton.

Crump & Son.

GROVE, J.

1885.
July 18.

THORMAN v. BURT AND OTHERS.

Timber sleepers were floated alongside a vessel on rafts, and there delivered to the mate, who gave a receipt for them.

Held, that the goods were not "shipped on board" within the meaning of a bill of lading.

ACTION by shipowner against endorsees of bill of lading for freight. The claim was admitted, and the amount claimed for freight was paid into Court less 27*l.*, for which, the defendants purchasers of the goods shipped under the bill of lading, counterclaimed for short delivery.

The goods shipped were timber sleepers, they were floated alongside the vessel at Dantzic, in rafts, where they were delivered to the mate, who gave a receipt for them. 7,200 sleepers were thus floated alongside, and the mate gave receipts for the whole number, and the bill of lading was made out for the whole 7,200; 154 however were never in fact shipped on board, but were lost after delivery alongside.

The bill of lading stated as usual that the goods were "shipped on board." There were no excepted perils in the bill of lading.

Cohen, Q.C., and *J. G. Barnes*, for the plaintiff, contended that as the goods were not in fact shipped on board, the shipowner was not liable under the bill of lading. They cited *Grant v. Norway*, 10 C. B. p. 665.

Finlay, Q.C., and *Armitage*, contended that the delivery alongside to the mate was practically a shipment, and that the shipowner was therefore liable for short delivery. They cited *British Columbia Saw Mill Company v. Nettleship*, L. R. 3 C. P., per *Byles, J.*, at p. 502.

GROVE, J.—The 154 sleepers were never in fact shipped on board, they were delivered alongside, and I cannot construe "delivered alongside" as the same thing as "shipped on board." There must be judgment for the plaintiff on claim and counterclaim.

*H. C. Coote & Co.**Wild, Brown & Wild.*

SMITH, J.

CAWLEY v. THE NATIONAL EMPLOYERS' ACCIDENT AND GENERAL ASSURANCE ASSOCIATION, LIMITED.

1885.

February 8.

THIS was an action by the executrix of one Charles Cawley, deceased, upon a Policy of Insurance in the defendant company effected by him against death by accident. The deceased met with an accident by falling down some steps, upon which death ensued. The evidence showed that at the time of the accident happening the deceased was suffering from gall-stones. The material parts of the policy are as follows:—

“Whereas Charles Cawley (hereinafter called the assured) is desirous to effect an assurance with The National Employers' Accident and General Assurance Association, Limited. . . . And whereas the assured has paid to the association the sum of £ Now this policy witnesseth that the association doth hereby agree, subject nevertheless to the several provisions hereinafter contained, and to the conditions and stipulations endorsed hereon which are to be conditions precedent to the right of the assured to sue or recover hereunder, &c., &c. In case such injury shall cause his death within three calendar months from the occurrence thereof, the association shall pay the sum of £. to the legal personal representatives of the assured, &c., &c.

“Condition 2.—No claim shall be made under this policy in respect of any injury unless the same shall be occasioned directly and solely by external and material causes visibly operating upon the person of the assured, whereof proof satisfactory to the association shall be furnished. . . . This policy does not insure against death accelerated or promoted by any disease or bodily infirmity,

A policy of assurance against injury and death by accident, after reciting that A., therein- after called the assured, was desirous of effecting an assurance, witnessed that the insurers did thereby agree, subject nevertheless to the several provisions therein- after contained, and to the conditions and stipulations endorsed thereon, which were to be conditions precedent to the right of the assured to sue or recover thereunder, etc. Held, that the conditions were conditions precedent to the right not only of the assured, but of his legal personal representatives, to recover thereunder. One of the con-

should be occasioned directly or solely by external or material causes v/ the person of the assured, whereof proof satisfactory to the insurers And that the policy did not insure against death, etc., accelerated or pro or bodily infirmity, or any natural cause arising within the system of accelerated by accident or not. A, met with an accident, upon which de would not have ensued had he not at the time of the accident been suffe Held, that the insurers were not liable.

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any natural cause arising within the system of the assured, whether accelerated by accident or not.

"Condition 3.—Notice of any accident must be given to the association within seven days of its occurrence."

By condition 4, the notice was required to be in writing.

The further facts sufficiently appear from the judgment of the learned judge.

C. C. Scott for the plaintiff.

J. B. Firth for the defendants.

SMITH, J. — This action is brought by Sarah Harriet Cawley, the widow and executrix of Charles Cawley, against the National Employers', &c., Association, to recover the sum of 1,000*l.* upon a policy dated 20th January, 1883. It is submitted to me that I ought to nonsuit the plaintiff, or enter a verdict for the defendants on two grounds, viz., that the 2nd and 3rd conditions of assurance had not been complied with, as the evidence brought forward by the plaintiff showed. It has been said by Mr. Scott that these conditions do not apply in this case. The policy says—

"The association doth hereby agree, subject nevertheless to the several provisions hereinafter contained, and to the conditions and stipulations endorsed hereon, which are to be conditions precedent to the right of the assured to sue or recover hereunder."

He submits that these conditions on the back of the policy are to be struck out altogether after the assured dies, and have no application where the claim is made by the personal representatives. Now I cannot agree with that. This policy, when you look at it, begins like all other policies. It recites—"Whereas Charles Cawley is desirous to effect." What is the meaning of that? He is desirous of effecting an assurance in case he meets with an accident, or with his death by accident. With whom was the contract made? Made clearly, in my opinion, with Charles Cawley, his executors, administrators, and assigns. Therefore, when it says—"Whereas Charles Cawley is desirous to effect, &c.," it means, he desires to effect an insurance upon himself, and the company contract with him and his personal representatives, in case of accident. The words are put in "hereinafter

called the assured." This is for the purpose of shortening the writing. Therefore I feel myself bound to read "the assured" as representing not only Charles Cawley, but his executors, administrators, and assigns. That being so, these conditions are clearly, to my mind, conditions precedent. Now what is Condition 2?

"No claim shall be made under this policy in respect of any injury unless the same shall be occasioned directly and solely by external and material causes visibly operating upon the person of the assured, whereof proof," &c.
 "This policy does not assure against death accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not."

The meaning of that seems to me to be clear. It means the company assure against accident, and if you by accident lose your life, which accident directly causes death, then, say the company, we will pay the amount of the policy, and not otherwise. What is the evidence before me? It seems to me that the question of fact which I have to decide is whether his death was occasioned solely by the accident. It seems to me that there would have been no death if the deceased had not had gall stones. This, it appears to me, the company has proved out of the mouths of the plaintiff's witnesses. Now with regard to the 3rd condition.

"Notice of any accident must be given to the association within seven days of its occurrence."

What is the meaning of that? It is made a condition, if a man meets with an accident, in order that the company may go and see him. Now, in this case, although on the 15th November, 1883, the accident took place as to which this action is brought, no notice in any shape or way is given to the present company until the 1st December. I may also say it is not given in writing, as it should be under condition 4.

The non-compliance with these conditions is, to my mind, fatal to the plaintiff's claim, and I therefore enter a verdict for the defendants, with costs.

Marsland, Hewitt & Everitt.

Berry & Binns.

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WILLS, J.

BUTLER v. BUTLER.

1885.

February 28.

A husband married since the passing of The Married Women's Property Act, 1882, may recover in an action against his wife, monies lent by him to her, at her request, since the marriage, whether the repayment was expressly charged by her upon her separate estate or not; but this Act does not enable a husband to maintain an action against his wife for monies lent by him to her at her request prior to their marriage.

THIS was an action by a husband against his wife to recover back, out of her separate estate, monies paid by him for her, at her request, both before, and since, marriage.

Kemp, Q.C., and *Kisch*, for the plaintiff.

Rose Innes for the defendant.

The material facts and arguments appear from the judgment.

WILLS, J.—This is an action by a husband against his wife seeking to have it declared that, (1) monies lent by him to her before marriage, and (2) monies lent by him to her after marriage, are a charge upon her separate estate, and asking for the necessary inquiries in order to give effect to his claim.

The marriage took place on the 7th April, 1883. The wife was carrying on a business of her own as a provision dealer.

They lived away from the place of business, and she carried on the business after marriage apart from her husband. Before the marriage the plaintiff had, at the request of the defendant, paid sums of money for her to pay debts she owed in business. After marriage he paid other sums at her request, and he lent her other sums, as to some of which, at all events, there is evidence that she proposed to him to charge them upon her separate estate.

It is objected that no action will lie.

The monies advanced before marriage constituted, it is admitted, antenuptial debts.

To them and to the loans and payments upon request made after marriage very different considerations apply. I will consider first the case of the loans and payments upon request made after marriage.

Now I take it to be clear that in the ordinary sense in which we understand a mere personal contract, neither at law nor in equity, can there be any contract between husband and wife. I take it to be equally clear that this general rule is subject to the qualification that with respect to the wife's

separate estate free from restraint upon anticipation, she is competent to contract, and to contract with her own husband: *Hewison v. Negus*, 16 Beav. 594, 598; *Vansittart v. Vansittart*, 4 Kay & J. 62—70. It is difficult to see any difference in principle between cases in which mutual stipulations in post-nuptial settlements have been enforced on the ground of such capacity to contract, or in which such settlements have been upheld against creditors as not being voluntary, and a case like the present, in which a contract of loan is sought to be upheld: *Woodward v. Woodward*, 3 De. G. J. & S. 672, is a very distinct authority to this effect. "This Court," says Lord Westbury, "has established the independent personality of a *feme covert* with respect to property settled to her separate use. This is a remarkable instance of legislation by judicial decision, whereby the old common law has been entirely abrogated, and the power of the wife to contract with her husband has been established. It is quite clear that if money part of the income of her separate estate be handed over by her to her husband upon a contract of loan, the wife may sue her husband upon that contract." *Ibid.*, p. 674.

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If the capacity of contract exist, the power and the remedy must alike be mutual, and the husband must be able to sue the wife as well as the wife the husband, and indeed in many cases undistinguishable in principle from this, the husband has sued in Courts of Equity.

As to some of these claims the wife is alleged to have expressly charged or promised to charge her separate estate; as to others, she merely appears to have borrowed them or requested her husband to pay them under such circumstances as (it is to be assumed for the purposes of my present decision) but for the relation of husband and wife would have raised a legal obligation to repay the money advanced by the husband.

But this distinction has, I think, no effect upon the rights of the parties, inasmuch by s. 1, sub-s. 3, of the Married Women's Property Act, 1882, every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown.

As to the postnuptial loans advanced by the husband, therefore, I think the plaintiff has a right of action.

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To the antenuptial advances, very different consequences apply. There is no doubt that prior to the Married Women's Property Act, 1882, no such action could have been maintained, but it is alleged that it will now lie under the provisions of that Act. It is necessary therefore carefully to examine its provisions bearing upon this question.

By s. 12 it is enacted that "every woman, whether married before or after this Act, shall have in her own name against all persons whomsoever including her husband, the same civil remedies for the protection and security of her own separate property as if such property belonged to her as a *feme sole*." This enactment, however, is silent as to any correlative rights of the husband, and has no application to a claim by the husband upon the wife's separate estate. It is urged that the Act must have meant to give the husband correlative rights in respect of the separate property of the wife. I answer, I do not see why. I take the Act to mean exactly what it says,—no more and no less. It is said, that it destroys the doctrine of the common law, by which there was what has been called a surety of person between husband and wife. Again, I say, I do not see why. It confers in certain specified cases new powers upon the wife, and in others new powers upon the husband, and gives them in certain specified cases new remedies against one another. But I see no reason for supposing that the Act does anything more than it professes to do, or either abrogates or infringes upon any existing principles or rules of law in cases to which its provisions do not apply.

I pass, therefore, to s. 13, which deals with the wife's responsibility in respect of antenuptial liabilities, whether arising out of contract or tort. It is provided that "a woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted and all contracts entered into or wrongs committed by her before marriage . . . and she may be sued for any such debts and for any liability in damages or otherwise under any such contract or in respect of any such wrong, and all sums recovered against her in respect thereof or for any costs relating thereto shall be payable out of her separate property, and as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or

wrongs, and for all damages or costs recovered in respect thereof."

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The words of the earlier part of the section are large enough to cover the present contention of the plaintiff, but it is very material to observe that they apply equally to torts as well as to contracts, yet it is expressly provided by s. 12 that with the exception of the very special case to which s. 10 refers, no husband or wife shall be entitled to sue the other for a tort. If s. 13 had been intended to cover cases of claims by a husband as well as those by a stranger against the wife it would scarcely have failed to have some reference to the enactment immediately preceding that no husband should be able to sue a wife for a tort. The provision as to the primary liability between husband and wife is apparently intended to apply to the whole of the area covered by the preceding parts of the section. And yet it is insensible as applied to the case of an action for claims of the husband against the wife's separate estate. A proviso follows which does not, I think, throw further light upon the question, and is only worth a passing notice as a curious specimen of drafting. In an Act repealing two other Acts and professing in terms to consolidate or amend their provisions, they are referred to in such a manner that it would be impossible to understand the present enactment without an examination of the whole of the provisions repealed.

Ss. 14 and 15 contain important provisions concerning the *husband's* responsibility for his wife's antenuptial liabilities, whether of contract or tort. They are, of course, applicable only to actions by strangers. They are obviously intended to be supplementary to the provisions of s. 13, and they confirm, in my opinion, the view that in no part of this group of sections was it intended to deal with antenuptial claims either of husband or wife against one another.

S. 17, which provides a summary remedy in case of certain classes of disputes as to property between husband and wife, has no application to or bearing upon the present question.

There remain only to be considered the provisions of s. 1, sub-s. 2, whereby it is enacted that a married woman shall be capable of suing and being sued either in contract or in tort or otherwise in all respects as if she were a *feme sole*. This provision, however, affects mode of procedure. The section

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dispenses in terms with the necessity of joining the husband as plaintiff or defendant, and I am of opinion that, except as to contracts made by a woman whilst under coverture, it was not intended to enlarge any rights or liabilities of either husband or wife apart from those which may necessarily flow from the fact that the husband need no longer be joined, as a matter of procedure which will have principally to do with liabilities to costs.

I am of opinion, therefore, that in respect of the antenuptial liabilities of the wife to the husband, the action cannot be maintained. Payments made by him after marriage upon requests antecedent to marriage are liabilities arising after marriage, and fall under the first head of claim which I have discussed.

Judgment accordingly.

Van Sandau, Cumming & Armitage.

C. A. Angier.

GENERAL INDEX.

ABATEMENT (PLEA IN)—Since the abolition of pleas in abatement, the proper course for a defendant desirous of raising the objection of the non-joinder as a defendant, of some one jointly liable with him, is to apply by summons at Chambers, supported by an affidavit stating the facts, and showing that the person alleged to be jointly liable is within the jurisdiction to have the action stayed. *MACARTHUR v. HOOD* 550

ACT OF GOD—A vessel was lost through stress of weather and without negligence. *Held*, in the absence of express stipulation, that there was no liability implied by law on the part of the person in possession for loss so occasioned. *SMITH v. DRUMMOND* 160

ADVOWSON—A vicarage consisted of two medieties, the advowson of one of which was vested in the Lord Chancellor and of the other in W. In August, 1878, the Lord Chancellor, under 26 & 27 Vict. c. 120, sold the advowson of the first mediety to W., sect. 21 of that Act providing that it should not be lawful for the purchaser to sell or contract for the sale of the advowson or next presentation till the expiration of five years from the date of the sale to such purchaser. By Order in Council of May, 1879, ratifying a scheme prepared under 3 & 4 Vict. c. 113 (1), the two medieties became one undivided benefice; (2) W. became incumbent thereof; (3) the advowson was vested in W., his heirs and assigns. In August, 1879, W. mortgaged the advowson of the consolidated benefice to H., to whom, prior to his purchase from the Lord Chancellor of the first mediety, he had mortgaged the second. All the mortgages contained the usual powers of sale. In March, 1882, H. died, and in March, 1883, his executors contracted to sell the whole advowson to his widow under the power of sale in the mortgage, and in April, 1883, the widow of H. contracted to sell it to E. In June, 1883, W. died insolvent (the mortgage debt being still unpaid), having by his will devised all his real estate to trustees in trust to receive the income thereof, and pay it over to his wife for her life. In December, 1883, the executors, on the nomina-

tion of H.'s widow, presented a person designated by E. to the Bishop for induction. *Held* (1), that the right of nomination and presentation was in W.'s widow under his will and not in the executors of H.; (2) that the Order in Council of May, 1879, did not avert the operation of the prohibition on sale for five years contained in sect. 21 of 26 & 27 Vict. c. 120; (3) that the presentation of the person designated by the executors could not operate as a new contract of sale, though after the expiration of five years from August 1878, as the living being vacant at the time of such presentation, the contract would be invalid. *WELCH v. BISHOP OF PETERBOROUGH* 534

AFFIRMATION—*See* OATH.

AFTER-ACQUIRED PROPERTY—*See* BILL OF SALE, 7.

AGENT—*See* PRINCIPAL AND AGENT.

AGREEMENT CONCLUDED—A. and B. agreed to take C. into partnership at a future date, the agreement required by both sides to be drawn up by solicitors. The parties had not considered, and could not afterwards agree upon, several terms of the intended partnership. *Held*, that there was no concluded agreement between the parties. *CONNERY v. BEST, SAXBY & Co.* 291
See, too, CONTRACT, 6.

ALTERATION—Where the subject matter of an agreement of hiring was expressed to be "furniture, etc. etc., mentioned in the schedule hereto," and the schedule was added by the plaintiff after execution. *Held*, that this did not vitiate the agreement. *HARRIS v. TENPANY* 65

APPORTIONMENT ACT—*See* LANDLORD AND TENANT, 13.

APPROPRIATION—*See* BILL OF SALE, 4

ARBITRATION—A contract for the sale of wheat to arrive, contained a clause that any dispute arising thereout should be referred to arbitration, as therein provided. On its arrival, the buyer claimed the right to reject it, on account,

ARBITRATION—*continued.*

of inferiority in quality. The sellers at once called for an arbitration. The arbitrators made an award that the purchasers should take the wheat with an allowance. *Held*, that the award was invalid, inasmuch as the only question submitted to the arbitrators was the buyer's right to reject. No custom exists in the Liverpool corn trade compelling a buyer to accept, with an allowance, wheat inferior in quality to that contracted for, if not sea-damaged. *SINADINO, RALLI & Co. v. KITCHEN & Co.* . . . 217

ARCHITECT—*See* SCHOOL BOARD; BUILDING CONTRACT, 3; CONDITION PRECEDENT, 2.

ATTACHMENT OF DEBT—*See* CHEQUE, 1.

ATTESTATION—*See* WILL.

AUDITORS—*See* COMPANY, 4.

BANK—Where a bank has, as a matter of fact, always treated cheques paid in by a particular customer as cash before clearance, it cannot, as against such customer, set up a usage entitling it to exercise a discretion as to whether each particular cheque should be so treated. *ARMFIELD v. LONDON & WESTMINSTER BANK.* 170
See, too, DEPOSIT; DAMAGES, 3.

BANKRUPTCY—A trustee appointed by the creditors in composition proceedings to receive and distribute the debtor's assets is entitled to be put in funds in cash by the debtor in time to enable him to pay the instalments upon the date fixed for payment thereof. A right to seize and sell the debtor's property given as security for the punctual payment of an instalment does not upon default of punctual payment postpone the relegation of the creditors to their common law rights till after the realization of the security. *BRINTON v. MADDISON* . . . 68

2. — Where a trustee for creditors in composition proceedings under the Bankruptcy Act of 1869 might, but for his default, have been in funds to pay an instalment on the due date, the legal consequences, so far as the debtor is concerned, are the same as if the trustee had been in funds. Where, after a composition payable at fixed dates has been agreed upon, a creditor sends in an amended proof for a larger sum, the trustee is entitled to a reasonable time from the sending in of such amended proof for payment of the amount due thereon. *BURGESS AND ANOTHER v. GILLESPIE* . . . 321

3. — The notice to be served on a sheriff of a bankruptcy petition having been presented against or by the debtor under sect. 46, subsect. 2, of the Bankruptcy Act, need not necessarily be in writing. *CURTIS v. THE WAINBROOK IRON CO.* . . . 351

BANKRUPTCY—*continued.*

4. — The title of a trustee in bankruptcy to the bankrupt's property relates back under sect. 11 of the Bankruptcy Act, 1869, to the original act of bankruptcy, although composition proceedings were taken in the first instance which were afterwards superseded by bankruptcy. When such a supersession takes place the title of the trustee in bankruptcy is prior to that of a creditor who has seized and sold the debtor's goods with notice of the original act of bankruptcy. *BARRON v. EHLERS, SEEL & Co.* . . . 432

5. — If a bankrupt join with his trustee in selling the goodwill and business previously carried on by the bankrupt, and agrees with the purchaser not to carry on a similar business within a prescribed district, such agreement is binding on him, and he can be restrained from so doing. *THE BUXTON AND HIGH PEAK PUBLISHING, ETC. CO. v. MITCHELL* . . . 527

BILL OF COSTS—*See* SOLICITOR, 1 and 2.

BILL OF EXCHANGE—The rule that a drawer of a bill of exchange cannot sue an indorser, only applies where circuity of action would otherwise arise. Where the contract between a creditor, debtor, and surety is embodied in a bill of exchange, in an action by the creditor against the surety on the bill, no other evidence save the bill is required to satisfy the Statute of Frauds if the obligation revealed on the face of the bill is the precise obligation the surety has agreed to undertake. *HOLMES v. DARKEE* . . . 23

2. — The rule that payment by the drawer of a bill of exchange to the holder does not discharge the holder's claim against the acceptor, does not apply where the bill has been accepted for the accommodation of the drawer. *SOLOMON v. DAVIS* . . . 83

3. — Where a promissory note was payable a month after demand, forgiveness of the amount of the note is no defence unless the forgiveness be *before* the note has become payable. *SMITH v. GORDON* . . . 105

4. — The fact that one person writes his name on the back of a bill of exchange, and hands it to another, does not necessarily constitute the former an indorser. *WESTACUTT v. SMALLEY* . . . 124

5. — No action will lie by a firm as indorsees of a bill of exchange against their indorsers if a member of the plaintiffs' firm be one of the indorsers. *FOSTER, HIGHT & Co. v. WARD* . . . 168

6. — A person to whom a bill is restrictively indorsed for collection who has paid the amount of such bill to the indorser cannot by reason of such payment acquire rights on the

BILL OF EXCHANGE—continued.

bill against the acceptor, where the amount of the bill has been paid to the indorser before maturity. *WILLIAMS, DEACON & Co. v. SHAD-*
BOLT. 529

7. — The drawer of a bill, after its maturity, wrote a letter to the holder in the following terms:—"I accept notice of non-payment of my draft, and admit my liability to you therein in every manner, as though the same had been given in a regular way." The bill in question had not, in fact, been presented for payment, but of this the drawer, when he wrote the above letter, was ignorant. *Held*, that there had been no dispensation by the drawer of the consequences of non-presentment for payment. *KEITH v. BURKE*. 551

See, too, PROCEEDS OF SALE; CHEQUE, 2.

BILL OF LADING—A charterparty provided that the bill of lading should be conclusive evidence against the owners of the quantity of cargo received. The cargo (timber) was floated alongside the vessel, and receipts by the mate then given for the same. Part of the cargo was lost by perils of the sea before shipment. The loss was notified by the master to the agent of the charterer, but, at the latter's request, the master was induced to sign bills of lading for the whole quantity received alongside. *Held*, that the charterer had no claim against the shipowners in respect of the difference between the amount of cargo received alongside, and the amount shipped on board. *PYMAN v. BURT* 207

2. — A bill of lading stipulated (*inter alia*) that "the merchandise shipped thereunder was to be received on the quay at London, and delivered therefrom by the person appointed by the steamship's agents, &c., the merchandise to be received and delivered according to the customs and usages of the respective ports." A custom was proved with regard to grain cargoes coming to London, that if the merchant does not demand delivery of the grain within twenty-four hours after the ship's arrival, the ship is entitled to discharge the goods on the quay. The merchant did not demand delivery of the cargo within twenty-four hours, and it was landed on the quay. *Held*, that, notwithstanding the custom, the shipowners were bound to pay the expenses incurred in weighing out the cargo and the quay rates. *ASTE, SON, & KER-CHEVAL v. STUMORE, WESTON & Co.* 319

3. — A company owned a line of steamers called the "Monarch Line," running between New York and London. A. was in the habit of shipping goods on steamers running on this line. A. shipped goods on a steamer at New York, and received a bill of lading made out in the ordinary form given by the company for goods shipped on their steamers, save that it had the words "extra steamer," added after

BILL OF LADING—continued.

the words "Monarch Line of Steamships." At London an overside release for the goods was signed and given by the company's agent to A., and the freight received by them from A. *Held*, in an action by A. against the company for non-delivery of the goods, that the company were estopped from saying that the contract of shipment was not made with them. *HERMAN v. THE ROYAL EXCHANGE SHIPPING Co.* 413

4. — Timber sleepers were floated alongside a vessel on rafts, and there delivered to the mate, who gave a receipt for them. *Held*, that the goods were not shipped on board within the meaning of the bill of lading. *THORMAN v. BURT* 596

See, too, CUSTOM, 2; CHARTERPARTY, 3.

BILL OF SALE—"Walter Neve, of Luton, in the county of Bedford, Solicitor." *Held*, a sufficient description of an attesting witness within the meaning of the Bills of Sale Act, 1878. *GARDNER v. SMART* 14

2. — A bill of sale the time for the renewal of the registration of which, under the Bills of Sale Act, 1866, has expired before the commencement of the Bills of Sale Act, 1878, cannot be re-registered under sect. 14 of the latter Act. *ASKEW v. LEWIS* 34

3. — A sale of wheat, with the assent of an insolvent tenant for the purpose of paying the incoming valuation due to the landlord, is not a sale in the ordinary course of business within the meaning of the licence implied by law in the case of a bill of sale given by a trader left in possession of his stock in trade. *MUSGRAVE v. STEVENS* 38

4. — Where a receipt was given for 80*l.* as the purchase-money of 60,000 bricks, which remained in the possession of the seller. *Held*, a document needing registration under the Bills of Sale Act, 1878. Where, after a sale of 60,000 bricks, part of a bulk of 117,000, the seller had applied all but 62,000 for other purposes, and was still using them, when seized in execution. *Held*, there was no appropriation of any part of the 60,000 to the sale. *SNELL v. HEIGHTON* 96

5. — Sect. 8 of the Bills of Sale Act, 1878, is still in force as regards *absolute* bills of sale. "Apparent possession" in that section means, "Apparently in the possession of," as distinguished from "Actually in the possession of," and goods may at the same time be in the true and actual possession of one person, and in the apparent possession of another. *ROBINSON v. TUCKER* 173

6. — By a bill of sale the mortgagor agreed: (1) Not to permit or suffer himself to be sued for any debt or debts justly due or

BILL OF SALE—continued.

owing, &c.; (2) On demand in writing to produce and show to the mortgagee the receipts for the rent, rates, and taxes; (3) To insure the property assigned in offices in London or Westminster to be approved by the mortgagee, in default whereof it should be lawful for the mortgagee to insure and add the premiums paid by him to the security. The bill of sale empowered the mortgagee, on breach of any of the mortgagor's covenants, to seize, &c., and also contained a clause to the effect that the property should not be liable to seizure for any cause other than those specified in sect. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882. *Held*, that the bill of sale was not void as failing to comply with the form required by the Bills of Sale Act, 1882. **FURBER v. ABBEY** . . . 186

7. — A grantor of a bill of sale over jewellery left in possession of his stock-in-trade has no power to pledge the same. The acquiescence which will deprive a man of his legal rights must amount to fraud. A mortgagor of stock-in-trade left in possession thereof, with power to carry on his business, is not the agent for sale of the mortgagee within the meaning of the Factors Acts. A sold his business to B., but continued to carry it on as manager for B.; afterwards B. resold the business and stock to A., taking a bill of sale over the stock to secure payment of the purchase-money; the business was carried on throughout in the name of A. *Held*, that pledgees of the stock from A. after his re-purchase did not acquire a title thereto by virtue of sect. 2 of the Factors Act, 1877. A bill of sale assigned stock, &c., which should or might at any time or times during the continuance of the security be brought into the shop and premises. *Held*, that the title of the grantees to stock subsequently acquired and brought on to the premises prevailed over that of *bona fide* pledgees to whom the grantor had wrongfully pledged and delivered it. **JOSEPH v. WEBB** 262

8. — A bill of sale given by way of security for payment of money contained an agreement by the grantor to pay principal and interest up to demand within twenty-four hours after demand in writing. *Held*, that the bill of sale was void under sect. 9 of the Bills of Sale Act, 1878, Amendment Act, 1882, as not being in accordance with the form prescribed by that statute, the agreement to pay twenty-four hours after demand not being an agreement to pay within a stipulated time. **CLEMON v. TOWNSEND** . . . 418

See, too, MEASURE OF DAMAGES, 3.

BLASPHEMY—The mere denial of the truth of the Christian religion is not enough to constitute the offence of blasphemy; there must be added a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects, or by

BLASPHEMY—continued.

wilful misrepresentations or artful sophistries calculated to mislead the ignorant and unwary. **REGINA v. RAMSEY** . . . 126

BONDS—See WARRANTY OF TITLE.

BROKER—Where a broker, employed by the seller alone, effects a contract by means of a note sent to and accepted by the purchaser, a variation between this note and a note sent by the broker to the seller is immaterial. Letters not containing any reference to the quality or the time for payment of goods sold as agreed upon, do not constitute a sufficient memorandum of a contract to satisfy the Statute of Frauds. **MCCAUL v. STRAUSS** . . . 106

2. — A shipbroker, introducing a seller and buyer of vessels, is only entitled to commission on the business resulting proximately from the introduction. **WHITE v. BAXTER**. 199
See, too, CUSTOM, 4; CONTRACT, 2.

BUILDING CONTRACT—A contractor undertook to execute works with additions, enlargements, &c., within a specified time, the architect having power to extend the time for completion in proportion to the extra works so ordered. Additions were ordered and executed, and caused delay in completion of the works beyond the time specified, but the architect did not extend the time. *Held*, that the contractor was bound to complete the works within the time specified, and was liable to pay the stipulated damages for non-completion within such time. **TREW v. THE NEWBOLD-ON-AVON UNITED DISTRICT SCHOOL BOARD** . . . 259

2. — Where a building contract contained a clause that no extras should be paid for unless ordered in writing, and weekly bills delivered for the same, and this had not been done, though extra work had been executed. *Held*, that the fact that the architect's certificate for the final balance awarded a certain sum in respect of extras, did not entitle the builder to recover, beyond the certified sum, for extras in respect of which written orders had not been given nor weekly bills delivered. In an action for damages for breach of an agreement to refer disputes to arbitration, the plaintiff can recover only nominal damages if he would not have been entitled to succeed in the arbitration. **BRUNSDEN v. LOCAL BOARD OF STAINES** . . . 272

3. — A building contract provided, (1) that the builders were not to vary or deviate from the drawings or specifications, or execute any extra work of any kind whatsoever, unless upon the authority of the architect, to be shown as in the contract stated, and that in all cases where such extra or variation exceeded the sum of 10*l.*, the order or plan was to be further countersigned by two members of the Building Committee; (2) that the contract price should

BUILDING CONTRACT—*continued.*

be paid within one month after the architect should have certified in writing that the whole of the said building had been completed and finished to his satisfaction; (3) that the decision of the architect with respect to the amount, state and condition of the works actually executed, and also in respect of any and every question that may arise concerning the construction of the present contract, or the said plans, drawings, elevations, and specifications, or the execution of the works hereby contracted for, or in anywise relating thereto, should be final and without appeal. On the completion of the work, the architect certified that a certain sum was due, which sum included the price of extras above 10*l.*, which had not been counter-signed as required by the contract. *Held*, that the building owners could not resist payment of any part of this sum, on the grounds, (1) that the architect had by mistake certified for work not done, and improperly done; (2) that his certificate included extras for an amount over 10*l.*, the order for which had not been counter-signed by two members of the Building Committee; (3) that the architect had not made sufficient allowances for work not done. *LARTHORNE v. ST. AUDYNS* 486

BUILDING LEASE—*See* ILLEGALITY.**BYE-LAWS, REASONABLENESS OF**—*See* PUBLIC HEALTH.

CARRIER—The question whether the liability of a common carrier has been undertaken in a particular case is one of fact and not of law. *TAMVACO & Co. v. TIMOTHY* 1

2. — The duty of a carrier who manufactures his own carriages towards passengers whom he carries is to use due skill and care in the manufacture. If injury occur through imperfect construction, the onus is on the carrier to shew that such due skill and care has in fact been exercised. *HOLTON v. LONDON & SOUTH-WESTERN RAILWAY Co.* 542

CHARTER, CONSTRUCTION OF—The charter of a Corporation created for the purpose of regulating the trade of masonry in and about the City of London provided that "there shall or may be four-and-twenty or more of the said company, according to the discretion of the Master and Wardens for the time being, in manner and form hereafter in these presents expressed, to be named and chosen, which shall be and shall be called the assistants;" and in case of vacancies in the post of assistant, the charter provided that then and so often it shall and may be lawful to and for the Master and Wardens, and the remaining part of the assistants which shall then survive or remain, or any eight of them at their wills and pleasures from time to time to choose and name one or more,

CHARTER, CONSTRUCTION OF—*continued.*

other or others of the said company, to be assistant or assistants, &c. *Held*, that it was obligatory on the Corporation to always have at least twenty-four assistants. *WELLS v. MASON'S COMPANY OF LONDON* 521

CHARTER-PARTY—A charter-party, not amounting to a demise of the ship, provided for the carriage of a full and complete cargo of lawful produce and merchandise for payment of a lump freight, but was silent as to the use to which the passengers' cabins might be put. *Held*, that the charterers were not entitled to carry passengers in the cabins. Under the above circumstances there is no custom (a) entitling the charterer to carry passengers, or (b) entitling the shipowner to have passengers carried for his benefit. *SHAW, SAVILL & Co. v. AITKEN, LILBURN & Co.* 195

2. — Goods were shipped from Wilmington in the United States for Liverpool under a charter-party, which provided that freight was to be paid on the "Wilmington gross intake weight." *Held*, that this meant that the freight was to be paid according to the method of weighing adopted at Wilmington. *FULLAUGEN v. WALFORD* 198

3. — A charter-party provided that the vessel should proceed to Malta for orders, which were to be given from London within twenty-four hours after receipt of notice, or lay days to count. *Held*, the orders not having been given within the prescribed time, that the lay days did not begin to count, till the expiration of the twenty-four hours. A clause in a charter-party providing for the cesser of the charterer's responsibility on the goods being loaded does not absolve the charterer, if he be also the indorsee and holder of a bill of lading, incorporating the conditions of the charter-party, from liability for damage incurred at an intermediate port. *BRYDEN v. NIEBUHR* 241

4. — Under a charter-party providing that the vessel should proceed to Tonapse and Taganrog or "so near thereto as she may safely get" and there deliver cargo. *Held*, these ports being under blockade, that it was not a fulfilment of the contract for the vessel to discharge at Constantinople, even though that might be a reasonable course to adopt. *Held*, too, the charterers having paid the freight under protest at Constantinople, that the charterers were entitled to recover it back, as on these facts there was no implied contract to pay freight *pro rata*. *CASTEL v. TRECHMAN* 276

5. — Timber was consigned to the Surrey Commercial Docks under a charter-party, by which freight was made payable "for deals and battens, per St. Petersburg standard hundred, 2*l.* 5*s.*" *Held*, that freight was payable only upon the number of St. Petersburg standard

CHARTER-PARTY—*continued.*

hundreds as ascertained by the customary mode of measurement adopted by the dock company for timber cargoes. *NIELSEN v. NEAME.* . . . 288

6. — A charter-party provided, that should the steamer not be ready to load on or before the 31st May, 1882, the charterer should have the option of cancelling the charter. On that day the vessel had discharged two holds only of its outward cargo, and was not completely discharged till the middle of the following day. *Held*, that the charterers were entitled to cancel the charter. *GROVES, MACLEAN & CO. v. VOLKART BROTHERS* 319

7. — A charter-party provided that the hire of a vessel should commence at noon of a certain day, and freight was payable at so much per calendar month; and "at and after the same rates for any part of the month" until her delivery to owners. On the day the hiring terminated she was delivered to her owners at 5.30 P.M. *Held*, that the charterers were liable for freight for the whole day, commencing at noon of the day of her delivery. *ANGIER BROTHERS v. STEWART BROTHERS* . . . 357
See, too, CUSTOM, 3.

CHEQUE—Where a debtor draws a cheque in payment of a debt, which cheque is duly honoured and paid, there is no debt owing or accruing from debtor to creditor between the giving of the cheque and payment thereof. There is no duty upon the debtor who is served with a garnishee order *nisi* between such dates to stop payment of the cheque. *ELWELL v. JACKSON* 362

2. — A commercial traveller received seven cheques, three crossed generally, and four uncrossed, drawn in favour of his employer by customers. These it was his duty to forward to his employer, and he had no authority to endorse his employer's name thereon, or pay them in to his own account. The traveller endorsed his employer's name *per pro.* on all the cheques, and paid them in to his own account at his bankers, who immediately placed the amounts to the credit of his account as cash. They crossed both the three cheques crossed generally and three of the uncrossed cheques to other bankers, who obtained payment of the amounts for them from the banks upon which they were drawn. The seventh, an uncrossed one, was drawn upon themselves, and they placed the amount of this at once to the credit of the traveller. The bankers were told by the traveller who his employers were, but they never made any inquiries as to his authority to endorse cheques on behalf of his employers. The traveller, having drawn out the amounts, absconded, and never accounted to his employers for the amounts. *Held*, as to all the cheques, that the bankers were liable to the employers for the amounts

CHEQUE—*continued.*

thereof, and were not entitled to the protection of sect. 82 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), because their conduct had not been without negligence. *Held*, also as to the three cheques originally uncrossed, that the bankers did not bring themselves within the protection of sect. 82 by themselves crossing the cheques. *Held*, also as to the seventh cheque, drawn upon themselves, that the bankers had not paid the cheque so as to be protected by sect. 60 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61). *See* *SEMPLE*. Sect. 82 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), does not protect a banker becoming himself the indorsee of cheques endorsed by his customer, the banker having notice of the fact that the customer was only an agent, and abstaining from inquiry as to his authority to endorse his employer's name. *BINSELL v. FOX BROTHERS* 395
See BANK.

CHOSE IN ACTION—*See SHARE.*

COMMISSION—*See BROKER, 2.*

COMMISSION AGENT—*See DAMAGES (MEASURE OF), 7.*

COMPANY—A provision in articles of association that fully paid-up shares issued to an officer of the company should be retained by him and not dealt with by him for a period of seven years. *Held*, to be a provision for the protection of the company, and not to entitle a shareholder to invalidate a call made at a meeting of directors, at which a transferee of such shares was necessarily present to form a quorum, such transfer having been made by the consent of the company within the seven years. *LONDON AND WESTMINSTER SUPPLY ASSOCIATION LIMITED v. GRIFFITHS* 15

2. — An "abridged prospectus" not containing the date of, nor the names of the parties to, a contract for the sale of a patent to be worked by the company, to trustees on behalf of the company. *Held*, to be fraudulent within sect. 38 of the Companies Act, 1867, although it stated where full prospectuses could be obtained. *WHITE v. HAYMEN* 101

3. — Where after issue joined and notice of trial given in an action by a shareholder to have his name removed from the register of shareholders on the ground of fraud, the plaintiff attended and voted at a meeting of shareholders, held in the liquidation of the company. *Held*, to be conduct which debarred the plaintiff from prosecuting his action for fraud. *FOULKES v. QUARTZ HILL CONSOLIDATED GOLD MINING COMPANY* 156

4. — Sect. 91 of the Companies Clauses Act, 1845, prevents auditors from recovering any other remuneration than that fixed upon at

COMPANY—continued.

a general meeting of the company. PAGE *v.* EASTERN & MIDLANDS RAILWAY COMPANIES 280

See, too, MANDAMUS.

COMPOSITION—See BANKRUPTCY, 1.

CONDITION PRECEDENT—Where an action was compromised upon terms, one of which was that the defendant should pay the plaintiff 150*l.*, and another that the plaintiff should pay a third party's claim against the defendant. *Held*, that the payment of the third party's claim by the plaintiff was not a condition precedent to the plaintiff's right to sue for the 150*l.* LOCKHART *v.* WEBSTER 71

2. — Although the giving of a certificate by the architect be a condition precedent to a builder's right to payment for work done, the builder may nevertheless recover for the work done if the withholding of the certificate be due to the improper interposition of the employer, who prevented the architect from giving the certificate. BRUNSDEN *v.* BERESFORD 125

CONDITIONS OF SALE—See VENDOR AND PURCHASER, 1 and 3.

CONSIDERATION—See CONTRACT, 2, 4, and 6.

CONTRACT—A piano was let on the three years hire system, under an agreement providing that "In case of default in the punctual payment of any instalment, the instalments previously paid shall be forfeited to J. B. C., who shall thereupon be entitled to resume possession of the instrument." *Held*, upon default, that J. B. C. was entitled to the possession of the piano, although the instalments in arrear were tendered by the hirer, before action brought. CRAMER *v.* GILES 161

2. — A shipbroker agreed with a shipowner to procure him a charter of a vessel, in consideration of the shipowner chartering the same. *Held*, in an action by shipowner against shipbroker for breach of contract, that there was a good consideration for the shipbroker's promise. GLIDDON *v.* BRODERSEN, VAUGHAN & Co. 197

3. — A. contracted with B. to supply him with the whole of the Sevenoaks stone required at the Pembury reservoir, the same to be delivered into trucks of the railway company at Sevenoaks at 5*s.* 3*d.* per ton. *Held*, that A. was entitled to payment on delivery for the quantities delivered from time to time. LOCKWOOD *v.* TUNBRIDGE WELLS LOCAL BOARD 289

4. — The goods of A. were seized in execution and sold upon a judgment obtained against B. B. subsequently promised to pay monies to A. in consideration of such seizure and sale. *Held*, that the law would imply a request by B. to

CONTRACT—continued.

permit the seizure and sale, and that there was a good consideration to support B.'s promise. EDMONDS *v.* WALLINGFORD 334

5. — An agreement with a prisoner to become bail for him in consideration of the prisoner depositing with the intended surety the amount of bail is void, as being against public policy. The prisoner can recover the amount deposited for the security even before the time for which the bail is in force has expired. HERMANN *v.* JEUCKNER 364

6. — A. was a judgment creditor of C. B. wrote to A. a letter in the following terms (so far as is material):—"If C. leaves in your hands the order of Messrs. F., drawn upon Messrs. R., for 250 eight per cent. preference shares, &c., I will obtain, within one month from this date, with the sanction of C., a loan for him of 1000*l.* upon said order, and pay that sum to you against the delivery of said order." C. left the order in A.'s hands, and sanctioned the proposal contained in the letter. A. then wrote to B. as follows:—"C. brought me your letter on the 27th, and he has given me his written sanction to your obtaining the loan of 1000*l.* for him referred to in that letter, and we shall be glad to hear that everything is in order." *Held*, that assuming A.'s letter to B. to be a final acceptance of the offer contained in B.'s letter to A., there was consideration moving from A. to support B.'s promise, such consideration being the implied undertaking on the part of A. when he received the order to keep it till required for the purpose of being handed over to the person who would advance the 1,000*l.* on its security. But *held* also that A.'s letter to B. was not an acceptance of the offer contained in B.'s letter to A., and that the two letters did not therefore constitute a contract. HARSTON *v.* HARVEY 404

See, too, PRINCIPAL AND AGENT, 4; LIGHTERMAN; ILLEGALITY.

CONTRACT (CONSTRUCTION OF)—Where an agreement specified that advertisements should be inserted to the value of 90*l.* in part payment of goods to be purchased to the amount of 360*l.* *Held*, that the plaintiff was not entitled to recover in respect of the 90*l.* worth of advertisements without taking the 360*l.* worth of goods. MINSHALL *v.* BRINSMEAD 97

CONTRIBUTORY NEGLIGENCE—Where in an action for damages for personal injuries it appears from the plaintiff's own evidence that the injuries he sustained were partially attributable to his omission to take ordinary precautions against a danger created by the defendant's breach of duty, there is no case to go to the jury. SAYER *v.* HATTON 492

CONVERSION—See MEASURE OF DAMAGES, 2; POLICE.

CONVEYANCING ACT—*See* LANDLORD AND TENANT, 9 and 15; VENDOR AND PURCHASER, 3.

CORPORATION—A retainer of a solicitor by a Highway Board to oppose a bill in Parliament prejudicially affecting the district must be under seal; if it be not under seal, the solicitor cannot recover any expenses incurred by him in opposing the bill. *PHELPS v. UPTON SNODSBURY HIGHWAY BOARD* 521

COSTS—Under a covenant to indemnify against all actions and claims in respect of the covenants of a lease, costs properly incurred in reasonably defending an action brought for a breach of one of the covenants are recoverable as damages. *MURRELL v. FYSH* 80

2. — A garnishee can set-off against a judgment creditor costs incurred by him but not paid at the time the issue is directed, against which the judgment debtor is bound to indemnify the garnishee. *RYMILL v. THE WANDSWORTH DISTRICT BOARD* 92

3. — It is not a condition precedent of a solicitor's right to sue a guarantor of costs to be incurred, that the costs should have been taxed. *MOORE v. WALTON* 279
See, too, EXECUTORS, 2.

COUNTER-CLAIM—A counter-claim in respect of a separate cause of action is not a "reasonable dispute as to liability" within the meaning of sect. 4, sub-sect. 4 of the Merchant Seamen (Payment of Wages and Rating) Act, 1880. *DELA-ROQUE v. THE S. S. OXENHOLME CO. LIMITED* [122]

See, too, EXECUTORS, 2; SURETY, ESTOPPEL, 2.

COUNTY COURT—*See* ESTOPPEL, 3.

COVENANT—An estate was sold in plots for building purposes, according to a scheme. The conveyances contained restrictive covenants as to the buildings to be erected, entered into by the several purchasers with the vendors, their heirs, and assigns. *Held*, that the successor in title of the purchaser of one of such plots was entitled to enforce such restrictive covenants against the successor in title of an earlier purchaser of an adjoining plot. *BROWN v. INSKIP* [231]

See, too, VENDOR AND PURCHASER, 3.

COVENANT (CONSTRUCTION OF)—The erection of wooden boardings for the purposes of advertisements, fastened to the demised premises. *Held*, to be a breach of covenant not "to erect or make any other building or erection on any part of the demised premises." *POCOCK v. GILHAM* 104

CUSTOM—*Quære*, whether a custom exists on the London Stock Exchange that a broker not

CUSTOM—*continued.*

disclosing the name of the principal dealt with renders himself personally liable? *WILDY v. STEPHENSON* 2

2. — There is a custom in the Port of London entitling steamships with general cargoes using the docks to land their cargoes on the Dock quay. Sect. 67 of the Merchant Shipping Amendment Act, 1862, only applies where default in entry of the goods has been made by the owner. *MARZETTI v. SMITH & CO.* 6

3. — Under a charter-party providing that the ship shall load empty petroleum barrels as many as required by the master, say about 5000; the word "about" entitles the master to require at his option the shipment of 10 per cent. more or less than the amount specified. *ALCOCK v. LEEUW & CO.* 98

4. — In the rice trade a custom exists that, where a broker does not disclose in the contract note the name of the principal dealt with, although he may mention it orally, he is liable on the contract as a principal. *BAC-MEISTER v. FENTON, LEVY & CO.* 121
See, too, INSURANCE (MARINE), 1; ARBITRATION; CHARTER-PARTY, 1; BILL OF LADING, 2; SURVEYOR.

DAMAGES—A purchaser of a horse sent it back to the seller on the ground of non-compliance with a warranty. The horse did comply with the warranty; and whilst in the purchaser's stables, contracted a contagious disease. Of this the purchaser was unaware when he sent back the horse. On arriving back at the seller's stables, other horses of the seller's contracted the disease from it, and died. *Held*, that the seller could not recover damages from the purchaser for the loss of those other horses. *WRIGHT v. HETTON DOWNS CO-OPERATIVE SOCIETY* 200

2. — A vendor of goods knew at the time of entering into a contract that the purchaser was buying for the purpose of resale to a specific customer. The vendor failed to deliver a large portion of the goods. *Held*, that the purchaser was entitled to recover the profits he would have made on the resale, and the damages he had to pay to his sub-purchaser. *GUIBERT BORQUIS v. NUGENT* 337

3. — Where bankers, owing to a mistake, dishonoured a cheque of a customer, given in the course of business, which mistake was subsequently satisfactorily explained to the payee, but still the payee declined to deal further with the customer. *Held*, in an action for damages against the bank, that the customer could not recover damages for the loss of the payee's custom. *MORRIS v. LONDON & WESTMINSTER BANK* 498

4. — Underwriters on cargo paid the expenses of saving cargo in jeopardy owing to the negligence of the shipowner. *Held*, that the

DAMAGES—continued.

cargo-owner could recover these expenses as damages in an action for negligence against the shipowner, and none the less so, because such salvage expenses had been paid under an average adjustment under an agreement. *SCARAMANGA v. MARTIN* 500

5. — A charter-party provided as follows:—"Freight to become due upon the due delivery of the cargo, &c., but four-fifths of the freight, calculated on the quantity shipped, to be advanced and paid in cash in one month from the steamer sailing." The charterer duly paid this four-fifths, and afterwards the cargo was lost, owing to negligent navigation. *Held*, that the charterer was entitled to recover back this payment as damages for the loss of his goods, the value of which had been enhanced by its payment. *TURNBULL v. GREAT EASTERN & PENINSULAR NAVIGATION CO.* 595

See, too, *CONTS, 1; PROOF (ONUS OF); LORD CAMPBELL'S ACT—DEFAMATION, 3.*

DAMAGES (MEASURE OF)—The ordinary rule as to the measure of damages in case of breach of contract to accept a manufactured article, applies equally in the case of an unmanufactured article. Where therefore in the case of an unmanufactured article, there is a market price at the date of breach, the profits that would have arisen from the contract, and the losses sustained through its breach, cannot be considered as elements of the damage. *TREDEGAR IRON AND COAL CO. v. GIELGUD* 27

2. — The measure of damages in an action for conversion of goods is not restricted to their value at the date of the conversion, even where no special damage is laid. *JOHNSON v. HOOK* 89

3. — A mortgagee of goods can only recover against an auctioneer who has sold them by the direction of the mortgagor the actual damage he has sustained by the injury to his security. *MYERS v. MARSH* 116

4. — In an action for damages for non-delivery of goods, where the same class of goods is not obtainable in the market at the place of delivery, the price on a sub-sale by a purchaser is evidence of the *value* of the goods, and the amount by which such price on sub-sale exceeds the contract price may be recovered as damages, although the seller at the time of the contract had no notice of the sub-sale. *STROUD v. AUSTIN & CO.* 119

5. — Only nominal damages are recoverable for breach by the employer of a contract of hiring, if the person hired could have at once obtained other employment of a precisely similar kind, which a reasonable man would have accepted. *MACDONNELL v. MARSDEN* 281

6. — On a sale of seed potatoes, the pota-

DAMAGES (MEASURE OF)—continued.

atoes were of an inferior quality to that warranted. *Held*, that the purchaser was entitled to the difference in value between the crop actually produced, and the crop that would have been produced if the warranty had been complied with, if it were a reasonable thing for the purchaser to plant the seed without examination. *WAGSTAFF v. SHORTHORN DAIRY CO.* 324

7. — In an action for damages by a commission agent for wrongfully preventing him from earning his commission, the damages recoverable, where nothing remained to be done by the commission agent to entitle him to his commission if the transaction had gone through, are the full amount of the commission which he would have earned. *ROBERTS v. BARNARD* 336

8. — On breach of contract by the seller to deliver an article obviously valueless, if used for the purpose for which such an article is ordinarily used, the buyer is entitled to recover damages based on the value of the article, if used for the specific purpose for which the buyer bought it, although such specific purpose was unknown to the seller at the time of the sale. Such value may be ascertained by considering the net annual profits to be obtained from such specific use of the article. *DE MATTOS v. (Jr.) EASTERN S. S. CO.* 489

See, too, *LANDLORD AND TENANT, 12.*

DEFAMATION—Where a person courts the alleged slander by a question, the occasion is privileged. Where evidence has been given showing an utterly untrue statement to have been made, that is of itself sufficient *prima facie* evidence of express malice. *PALMER v. HUMMERSTON* 36

2. — A news vendor who in the ordinary course of business sells a newspaper containing a libel, is not liable to the person libelled, if (1) he did not know that the newspaper contained the libel; (2) such want of knowledge was not owing to negligence on his part; (3) the paper was not one likely to contain libellous matter. *EMMENS v. POTTE* 553

3. — The wrongful refusal of a third party to fulfil a contract may give a right to special damage for a slander, if such refusal be the probable consequence of the utterance of the slander. *SOCIÉTÉ FRANÇAISE DES ASPHALTES v. FARRELL* 563

DEMURRAGE—*See* *CHARTER-PARTY, 3.*

DEPOSIT—Where a company's bank received a money deposit from an applicant for shares in the company, and placed it to a separate account kept for such deposits; the bank having at the request of the company, and on receiving notice of allotment to the applicant of the shares in respect of which the deposit had been paid (which allotment was in fact invalid), transferred

DEPOSIT—*continued.*

the deposit to the overdrawn general account of the company, with knowledge that a meeting had been held with the object of winding up the company, and that its reconstruction was contemplated, and in spite of notice from the applicant not to part with the deposit without his authority. *Held*, that the bank was liable to repay the amount of the deposit to the applicant. **GREENWELL v. NATIONAL AND PROVINCIAL BANK** 58

DILAPIDATIONS—*See* LANDLORD AND TENANT, 7.

DISCOVERY—It is the duty of a party in an action who after filing an affidavit of documents discovers a document of which his opponent has a right to have inspection, but which is not disclosed in the schedule, to inform his opponent of the discovery either by supplementary affidavit (the proper course) or at least by notice. **MITCHELL v. THE DARLEY MAIN COLLIERY CO.** 215

DISMISSAL (WRONGFUL) — *See* DAMAGES (MEASURE OF), 5.

DISTRESS—Where an agent under an agreement with a firm of carpet manufacturers took premises, and put his principal's name outside as well as his own, and was entitled to carry on other agency business, but was in fact agent for only one other firm. *Held*, that the agent was not carrying on a "public trade," so as to exempt his principal's goods on his premises from distress. **TAPLING & CO. v. WESTON** 99

See LANDLORD AND TENANT, 4 and 6.

ELECTION—Where a tradesman claims against the real purchaser of goods in the same action that he claims against a person who held himself out as the purchaser. *Held*, that the claim against the latter cannot be sustained. **JONES v. ASHWIN** 159

See, too, COMPANY, 3; PRINCIPAL AND AGENT, 5.

ESTOPPEL—The plaintiff, a mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose; on the plaintiff demanding it back from time to time, the mortgagor made excuses for not doing so, and the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance; the plaintiff gave notice of his interest to the Insurance Company before the defendants. *Held*, that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to stop him from asserting his claims against the defendants. **HALL v. THE WEST END ADVANCE COMPANY** 161

2. — In an action in the County Court

ESTOPPEL—*continued.*

for a liquidated demand, the defendant, by way of defence, counterclaimed for unliquidated damages. These were assessed at an amount exceeding the plaintiff's claim, and exceeding the amount up to which the County Court has jurisdiction. The judgment was given for the defendant simply. The defendant sued in the High Court to recover the amount by which damages awarded to him in the County Court overtopped the plaintiff's claim. *Held*, that he was not estopped from doing so, and that the defendant (in the High Court action) was estopped from disputing the assessment of damages made in the County Court. **WEBSTER v. ARMSTRONG** 471

See, too, BILL OF LADING, 1 and 3; BILL OF SALE, 7; PRINCIPAL AND AGENT, 4; MANDAMUS; FOREIGN JUDGMENT.

EVIDENCE—Neither proof of an entry made by a deceased person in the ordinary course of business in a postage-book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of postage. **ROWLANDS v. DE VECCHI** 10

See, too, CUSTOM, 2; ALTERATION; STAMP; OATH.

EXECUTION CREDITOR — *See* INTERPLEADER, 2.

EXECUTORS—When executors received a premium upon the assignment of a lease, and paid the amount in to their testator's estate. *Held*, that they were not personally liable for rent accrued due after the assignment, in respect of the premium so paid in. **GOODLAND v. EWING** 43

2. — An executor was sued for damages for a breach of warranty given by his testator on the sale of a business. He denied the alleged non-compliance with the warranty, and also pleaded *plene administravit præter* certain sums. The plaintiff obtained judgment for a sum slightly less than the admitted assets. *Held*, that the executor was personally liable for the costs in so far as the testator's estate was insufficient to pay them. **SQUIRE v. ARNISON** 365

3. — In an action by an executor for the detention of goods of his testator taken possession of after the testator's death, the defendant may counterclaim for the funeral expenses of the testator, paid by him, and also for a debt due to him from the testator before his death. **WATKIN v. NEWCOMEN** 113

FACTORS ACTS—*See* BILL OF SALE, 7.

FOREIGN JUDGMENT—Where a person sued in a foreign court appears, although he does so in consequence of the duress of wishing to protect his property there, which, unless he ap

FOREIGN JUDGMENT—*continued.*

peared, would be liable to seizure, he cannot afterwards dispute the validity of the judgment in an action upon it in an English court. *VOINET v. BARRETT* 554

FORFEITURE—*See CONTRACT, 1.*

FRAUD—*See COMPANY, 2 and 3; PRINCIPAL AND AGENT, 3.*

FRAUDS (STATUTE OF)—A letter signed by the defendant cancelling a contract, and referring to an enclosed invoice which contained all the terms of the contract. *Held*, a sufficient note or memorandum of the bargain signed by the party to be charged within the meaning of sect. 17 of the Statute of Frauds. *ELLIOTT v. DEAN* 283

2. — A contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price is a contract for the sale of a chattel. *ISAACS v. HARDY* 287

3. — An agreement to advance money on the security of land is an agreement which requires to be in writing, by sect. 4 of the Statute of Frauds. *MOUNSEY v. RANKIN* 496

4. — Where by the terms of a contract one party can perform his part of it within the year, a subsequent request by the other party that such performance should be postponed till after a year, does not bring the case within sect. 4 of the Statute of Frauds, although such request be acceded to. *BEVAN v. CARR* 499
See, too, BILL OF EXCHANGE, 1; BROKER, 1; PART PERFORMANCE.

FRAUDULENT ASSIGNMENT—A trader insured his stock in trade and other effects. These were destroyed by fire. He assigned the policies to trustees on trust to pay and divide the monies received thereunder among all his creditors rateably, and to pay the balance, if any, to himself. *Held*, that the assignment was not void under 13 Eliz. c. 5, at the suit of a creditor whose debt was under 50*l.* *GREEN v. BRAND* [410]

FRAUDULENT SETTLEMENT—To avoid an ante-nuptial marriage settlement as a fraud upon creditors, it must be shewn that both husband and wife were parties to the fraud. *PARNELL v. STEDMAN* 153
See, too, GARNISHEE, 2.

FREIGHT—*See CHARTER-PARTY, 1, 2, 4, and 5; INSURANCE (MARINE), 3; DAMAGES, 4.*

GAMING—A cheque given in payment for counters obtained from the secretary of a club to enable the purchaser to gamble at cards, cannot be sued upon by the secretary. *ST. CROIX v. MORRIS* 485

GARNISHEE—A garnishee cannot set off against a judgment creditor a debt due to him (the garnishee) from the judgment debtor, if the garnishee was aware from the commencement of the transaction which resulted in his becoming indebted to the judgment debtor that the judgment debtor's right to such debt could only be as trustee for the judgment creditor. *FITT v. BRYANT* 194

2. — Where a man settles money by a deed fraudulent against creditors, a judgment creditor of the settlor's cannot by garnishee proceedings obtain payment of his debt from the trustee of the deed. *VYSE v. BROWN*. 223
See, too, COSTS, 2.

GAS—*See HIGHWAY AUTHORITY.*

GOODWILL—*See BANKRUPTCY, 5.*

GUARANTEE—*See COSTS, 3; PRINCIPAL AND SURETY.*

HIGHWAY AUTHORITY—A vestry were empowered by Act of Parliament to vest in themselves highways, and to repair such highways. In repairing such highways, they used steam-rollers of great weight, which fractured the mains of a gas company empowered by Act of Parliament to lay their mains under the highway in the district of the vestry. The vestry did not show that it was impossible for them to repair the roads without fracturing the mains. *Held*, that the gas company were entitled to an injunction to restrain the vestry from using the steam-roller in such a way as to injure their mains. *GAS LIGHT & COKE CO. v. VESTRY OF ST. MARY ABBOTTS, KENSINGTON* 308

HUSBAND AND WIFE—A woman, being executrix and residuary legatee, married in 1880. She had discharged all her duties *qua* executrix, save that she had not obtained payment of a sum of money which fell due to her testator's estate in September, 1879, for which sum she brought an action in 1883. *Held*, that the wife's title *qua* legatee accrued before the Married Women's Property Act, 1882, came into operation, and that the husband was entitled to this money *jure mariti*. *EDWARDS v. EDWARDS* 229

2. — Where a husband and wife were living together, and furniture was supplied for, and work done at, the house on the order of the wife, but the husband took part in making selections, and giving directions as to the execution of the orders. *Held*, that the husband was liable to pay for the goods and work, although he had expressly prohibited her from pledging his credit, and they had agreed together that she should pay for the goods and work. *JETLEY v. HILL* 233

3. — A husband married since the passing of the Married Women's Property Act, 1882,

HUSBAND AND WIFE—continued.

may recover in an action against his wife monies lent by him to her at her request since the marriage, whether the repayment was expressly charged by her upon her separate estate or not; but this Act does not enable a husband to maintain an action against his wife for monies lent by him to her at her request prior to their marriage. *BUTLER v. BUTLER* . . . 600

See, too, SEPARATE ESTATE.

ILLEGALITY—A building agreement provided that A. should build houses on land within a specified time, and that on their completion B. would grant to A. leases of them. A. agreed to pay a specified rent to B. from the date of the agreement to the expiration of the leases. The houses were not built by the specified time, and before they were built, an Act of Parliament rendered their erection illegal. *Held*, that A. was not relieved from his liability to pay the rent under the agreement. An agreement to build houses on a disused, unconsecrated burial ground, necessitating the removal of some thousands of corpses, which removal would of necessity involve an outrage on public decency, amounting to an indictable offence, is illegal. *GIBBONS v. CHAMBERS* . . . 577

INJUNCTION—Where in breach of an agreement by the defendant to serve the plaintiff for fourteen years as manager of his business (which agreement contained no express negative covenants), the defendant left the plaintiff, and started a similar business a few doors off. *Held*, that the court had power to grant an injunction, but that the power was discretionary, and the case was not one for its exercise. *JACKSON v. ASTLEY* . . . 181

See, too, VENUE.

INSURANCE (FIRE)—In a policy of fire insurance, in the absence of a provision that the policy is not to attach until payment of the premium, such a provision will not be implied. *KELLY v. LONDON AND STAFFORDSHIRE FIRE INSURANCE CO.* . . . 47

INSURANCE (LIFE)—A policy of assurance against injury and death by accident, after reciting that A., thereafter called the assured, was desirous of effecting an assurance, witnessed that the insurers did thereby agree, subject nevertheless to the several provisions therein-after contained, and to the conditions and stipulations endorsed thereon, which were to be conditions precedent to the right of the assured to sue or recover thereunder, etc. *Held*, the conditions were conditions precedent to the right not only of the assured, but of his legal personal representatives, to recover thereunder. One of the conditions provided that no claim should be made under the policy in respect of any injury unless the same should be occasioned directly or solely by external or material causes visibly

INSURANCE (LIFE)—continued.

operating upon the person of the assured, whereof proof satisfactory to the insurers should be furnished. And that the policy did not insure against death, etc., accelerated or promoted by any disease or bodily infirmity, or any natural cause arising within the system of the assured, whether accelerated by accident or not. A. met with an accident, upon which death ensued, but death would not have ensued had he not at the time of the accident been suffering from gallstones. *Held*, that the insurers were not liable. *CAWLEY v. THE GENERAL EMPLOYERS, ETC., ASSOCIATION* . . . 597

INSURANCE (MARINE)—Where an assured expects, but is not certain, that goods will come by a particular ship, the name of such ship is not a material fact, the non-disclosure of which prevents the policy from attaching; nor in such a case is there any usage of underwriters at Lloyd's, compelling the assured to disclose it. *KNIGHT v. COTESWORTH* . . . 48

2. — A policy of marine insurance on "pumps whilst engaged in salvage operations at the wreck of the *Childeric* near Brindisi, including all risk whilst being conveyed from Brindisi to "on board wreck," does not cover a loss of the pumps whilst being conveyed back to Brindisi on the wreck after the salvage operations were concluded. *DIFIORI v. ADAMS* . . . 228

3. — A shipowner shipped goods of his own on his own ship for a particular voyage from Sunderland to Valparaiso, and effected a policy of insurance on "freight." The ship was run into and damaged at the port of loading with the goods on board after the policy had attached, whereby the cargo was so damaged that it had to be unloaded, and the particular adventure was frustrated. The ship was detained in port some six weeks, and all expenses of repairs and demurrage were paid by the owners of the colliding ship. When again in a sea-going condition she was offered a similar cargo to the same port; this the ship-owner refused, and sailed with another cargo elsewhere. *Held*, that the shipowner could recover nothing on the policy, inasmuch as the salvage was, or might have been, equivalent to the freight insured. *GAYNER v. THE SUNDERLAND JOINT STOCK PREMIUM ASSOCIATION* . . . 293

4. — In a policy of marine insurance against "absolute total loss only," "absolute total loss" means a total loss other than a constructive total loss. A ship was insured against absolute total loss only, and on the voyage insured she was rendered by perils of the seas a constructive total loss of such a character that no prudent uninsured owner would have done anything to her. The voyage was abandoned, and by the continuous sea perils she became a total wreck. *Held*, that the loss was covered by the policy. *LEVY v. THE MERCHANT MARINE INSURANCE CO.* 474

INTERPLEADER—Where, after the making of an interpleader order, the sheriff, with the consent of the execution creditor and the claimant, temporarily withdrew from possession. *Held*, that the goods were no longer in *custodia legis*, and the landlord was entitled to distrain upon them, although he knew that the interpleader proceedings were pending. *CROPPER v. WARNER* 152

2. — Where, on a claim being made to goods seized by a bailiff, the execution creditor does not direct the bailiff to give up the goods to the claimant, but appears and contests his title in interpleader proceedings. *Held*, no evidence of a ratification by the execution creditor of the bailiff's detention. *TOPPIN v. BUCKERFIELD* 157

3. — Where an interpleader order provided that no action should be brought against the sheriff, and the order was subsequently rescinded owing to the default of the execution creditor to return the issue. *Held*, that the claimant had no cause of action against the sheriff for the original seizure. *MARTIN v. TRITTON* 236
See, too, LIVERPOOL COURT OF PASSAGE.

JOINT LIABILITY—*See* ABATEMENT (PLEA IN).

JUDICATURE ACTS—*See* LIVERPOOL COURT OF PASSAGE.

JURISDICTION—*See* PROHIBITION.

LANDLORD AND TENANT—Rent as between landlord and tenant is apportionable under the Apportionment Act, 1870. The estoppel which enables a landlord who is mortgagor to sue for rent is mutual, and renders him liable on the covenants in the lease. *HARTCUP & Co. v. BELL* 19

2. — An agreement by a tenant, under a lease, to pay interest at 5 per cent. on the amount of his incoming valuation, and "upon quitting, to leave a valuation of tenant rights equal in value, and of the same nature and kind." *Held*, not to create a personal debt to the lessor, but to enure for the benefit of a subsequent landlord. *WAGSTAFF v. CLINTON* 45

3. — In an action for the recovery of land for breach of a covenant to repair, relief will be granted under the Conveyancing Act, 1881, although the premises are in a very dilapidated condition, and the relief was not claimed by the pleadings. *MITCHISON v. THOMPSON* 72

4. — The price realised at a sale by auction of goods seized under a distress is good *prima facie* evidence of their value. *RAFLEY v. TAYLOR* 150

5. — Where premises were let as a jeweller's shop to be occupied during hours of business only. *Held*, that the landlord was, in the

LANDLORD AND TENANT—*continued.*

absence of express stipulation, under no liability for a loss occasioned by robbery during the night, even though the premises were insufficiently protected. *ESPIR v. TODD* 154

6. — A landlord cannot distrain upon the goods of third persons brought by himself on to the demised premises without the authority of the third person, even though the goods had been originally placed on the premises by the authority of the third person, and wrongfully removed by someone else. *PATON v. CARTER* 183

7. — A tenant in possession of premises under an agreement for twenty-one years from Michaelmas, 1861, liquidated by arrangement in 1872, and got his discharge in 1880. The trustee took no steps with regard to the premises, which the tenant continued to occupy till Michaelmas, 1882. *Held*, that the tenant was bound to leave the premises in the state of repair required by the agreement. *PONSFORD v. ABBOTT* 235

8. — One who has agreed to take a furnished house is not bound to fulfil his contract if the house be infected with measles at the date fixed for the commencement of the tenancy. If in such a case the lessor sue for rent, he must show, to entitle him to succeed, that the house was in fact in a state fit for human occupation at the date fixed for the commencement of the term, notwithstanding a previous intimation by the tenant of his intention to repudiate the contract. *BIRD v. LORD GREVILLE* 317

9. — A notice, requiring a tenant to remedy a breach of covenant by repairing premises within three months, expired on Feb. 1, 1884. No repairs were then done, and on Feb. 2, the rent due at Christmas, 1883, was accepted. *Held*, that the acceptance of the rent was no waiver of the breach of covenant. An assignee of a lease is a "lessee" within the meaning of sect. 14, sub-sect. 1, of the Conveyancing Act, 1881. A notice, under sect. 14, sub-sect. 1, of the Conveyancing Act, 1881, addressed to A. B. (the original lessee), and "all others whom it doth or may concern," and served on the persons in occupation of the demised premises, is sufficiently addressed to, and validly served on, the assignee of the lease. *CHROMIN v. ROGERS* 348

10. — A tenant is not justified in determining a tenancy of a furnished house, because during the term a portion of the plastering of the ceilings (which were cracked and fractured at the commencement of the tenancy) fell in one room, and the plastering of the ceilings in other rooms was unsound, and liable to fall. On a letting of a furnished house, the implied term that it shall be fit for human habitation only applies to the condition of the premises at the commencement of the tenancy. *MACLEAN v. CURRIE* 361

LANDLORD AND TENANT—continued.

11. — A lease contained a covenant by the landlord to keep (*inter alia*) the drains and sewers in good tenable repair. *Held*, that this did not extend to the rectification of a structural defect in the drains, but was confined to keeping the drains as they existed in a condition of good tenable repair. When a tenant is in possession of premises the drains of which the landlord has covenanted to keep in repair, notice by the tenant to the landlord of the defects complained of is essential before there can be a breach of his covenant by the landlord. *HUGGALL v. MCKEAN* 391

12. — A lessor is not deprived of any part of the ordinary damage recoverable on a breach of covenant by the lessee to deliver up the demised premises in good repair, by reason of the lessor effecting structural alterations in the premises after the determination of the lease. *INDERWICK v. LEECH* 412

13. — A lessee covenanted to pay the tithe or rent-charge in lieu of tithes, land-tax (if any), sewers rates, main-drainage rates, and all other taxes, rates, assessments, and impositions and outgoings whatsoever, then or thereafter to be charged or imposed on or in respect of the said premises, or any part thereof. *Held*, that the lessee was not liable to pay the amount charged by the urban authority for sewerage, levelling and paving the road on which the demised premises abutted, under s. 150 of the Public Health Act, 1875. *HILL v. EDWARDS* . . . 481

14. — A landlord who has wrongfully evicted his tenant between two quarter-days, is not entitled to the apportioned rent up to the day of eviction, under the Apportionment Act, 1870. *CLAPHAM v. DRAFER* 494

15. — A lease of farm lands contained a clause of forfeiture if (*inter alia*) the lessee should underlet or part with the possession of the demised premises, or any part thereof, without the consent in writing of the lessor first had and obtained, provided always that such consent should not be withheld if the proposed assignee or lessee were a respectable and responsible person. *Held*, that the consent of the lessor was not necessary if the lessee underlet or parted with possession of the premises to a respectable and responsible person. *BURFORD v. UNWILL* [494]

16. — A person in possession of premises under an agreement for a lease who has paid no rent, and done acts which would have amounted to breaches of covenants in the intended lease, and have occasioned a forfeiture, is not in a position to enforce specific performance of the agreement. Sect. 14 of the Conveyancing Act, 1881, does not apply to agreements for leases. *COATSWORTH v. JOHNSON* 543

LANDLORD AND TENANT—continued.

17. — A lease provided that on its termination the tenant should receive compensation for unexhausted improvements. At its termination, a new lease of the farm was granted to the tenant, nothing being said about the compensation. *Held*, that the tenant was entitled to compensation under the first lease. *LANE v. MOEDER* : : : : . 548

18. — Where a landlord is under no liability to his tenant to repair the premises, and a sub-tenant of such tenant, as to part of the premises, receives personal injuries, owing to the defective state of the premises, the landlord is under no liability to such sub-tenant. *NORRIS v. CATMUR* [576]

See, too, RENT.

LANDS CLAUSES ACT—The interference with, or obstruction of, a private right of way to demised premises by the execution of works is an interference with a right of property entitling the lessee to compensation under the Lands Clauses Consolidation Act, 1845. *FORD v. MET. & MET. DISTRICT RY. COMPANIES* . 593

LICENSE (DANCING)—Where dancing is not the principal part of a public entertainment, even though it is the principal part of a particular performance in the entertainment, if that particular performance be not a principal part of the entertainment, a dancing license is not required under 25 Geo. II. c. 36, s. 2. *FAY v. BIGNELL* 112

LIEN—A workman detaining a chattel in respect of a lien for work done thereon, has no claim for warehouse charges during such detention. *BRUCE v. EVERSON* 18

LIGHTERMAN—Where a lighter was let out "without risk of craft," and the goods on board were damaged by sea-water. *Held*, that the owner of the lighter was not liable for the loss. *WEBSTER & Co. AND ANDERSON & Co. v. BOND & STOREY* 338

LIMITATIONS (STATUTE OF)—An unsigned letter acknowledging a debt written by a debtor's wife at his dictation, and sent to the creditor in the same envelope with a letter to the creditor, written and signed by the wife, and which referred to the unsigned letter, is not a sufficient acknowledgment of a debt by a duly authorised agent of the debtor so as to take the case out of the Statute of Limitations. *INGRAM v. LITTLE* [186]

2. — A letter from a debtor to his creditor contained the following expressions:—"I was in hopes of being able to send you some coin by small instalment, but as I have been ordered home, the matter must be in abeyance a little longer, which won't ruin you. I know you must live in hopes as I do, for a good time is

LIMITATIONS (STATUTE OF)—continued.

rather long coming. . . . I can assure you such behaviour would not induce me to put myself out to attempt to square off your account. I think you ought to know me by this time. When I have had the means, you have got luck." *Held*, not a sufficient acknowledgment of a debt to take the case out of the Statute of Limitations. **JUPP v. POWELL** 349

See, too, NEGLIGENCE, 3; PRETENCED TITLE.

LIVERPOOL COURT OF PASSAGE—The assessor of the Liverpool Court of Passage was authorised by Act of Parliament to make rules regulating the practice and procedure of that Court. In December, 1876, he made the following rule:—"The provisions of the Supreme Court of Judicature Acts, 1873, 1875, and such orders and rules made in pursuance thereof as are now in force, as well as any orders or rules which may hereafter be made and be in force for the time being by virtue of the said Act, shall" [with an immaterial exception] "extend and be applied to, and the forms therein contained shall be adopted in all actions, causes and matters which at or after the time of the coming into operation of these rules shall be within the cognizance of the Court of Passage of the borough of Liverpool, but so far only as such provisions, orders, rules and forms respectively are or may be applicable thereto, with such alterations as the nature of the action, the description of the Court, the character of the parties, and the circumstances of the case may render necessary." *Held*, that this rule did not give the Passage Court the jurisdiction in Interpleader contained in Order LVII., rule 8, of the Rules of the Supreme Court, 1883. And that even if it did give such a jurisdiction, the rule was in that respect *ultra vires*. *Semble*. The above rule does not render the provisions of Order XIV. of the Rules of the Supreme Court, 1883, applicable to the Passage Court. Officers of the Court are not protected in the case of process executed under an Interpleader Order made without jurisdiction, though good on the face of it, if such order was obtained on their own application. The relief or remedy, the power to grant which is conferred on inferior courts by sect. 89 of the Judicature Act, 1873, only refers to the relief and remedies to be administered in the action, and as the result of the action, and not to an incidental and extraneous proceeding arising out of the levy of execution, such as Interpleader. The power to decide summarily without consent questions in Interpleader is not a "rule of law" within the meaning of sect. 91 of the Judicature Act, 1873. **SPEERS v. DAGGERS** 503

LODGING HOUSE KEEPER—*See* NEGLIGENCE, 2.

LORD CAMPBELL'S ACT—A husband and wife quarrelled, separated, and lived apart without

LORD CAMPBELL'S ACT—continued.

communication for eight years before the wife's death, who was killed at the age of fifty-six, through the negligence of carriers. The wife, had she survived her mother, who was aged eighty at the time of the wife's death, would have been absolutely entitled to the sum of 7,000*l*. *Held*, in an action by the husband against the carriers for damages, under Lord Campbell's Act, that he had no reasonable prospect of pecuniary benefit if his wife's death had not occurred, and was not, therefore, entitled to damages for her death. **HARRISON v. LONDON & NORTH-WESTERN RAILWAY** . . . 540

MANDAMUS—A prerogative writ of *mandamus* will not lie to compel a company to register as a holder of shares therein, a person to whom they have issued certificates in respect of such shares where the company have issued prior certificates in respect of such shares to someone else, without clear proof that the person to whom the last certificates were issued has a better title than the person to whom the earlier ones were issued, even though the person holding the earlier certificates has not been entered in the company's register as the holder of such shares. When such a writ is asked for, the company are not estopped from relying upon the actual facts. **REG. v. CHARNWOOD FOREST RAILWAY CO.** 419

MARRIED WOMAN—A charge given by a married woman upon her separate estate is sufficient evidence of the existence of separate estate to entitle a plaintiff to an inquiry. **THE LONDON DISCOUNT ALLIANCE (LIMITED) v. KERR** 5

2. — Bequest to a married woman of real and personal property "for her sole and absolute use and benefit." *Held*, sufficient to create a separate estate. **NEGUS v. JONES** . . . 52
See, too, HUSBAND AND WIFE.

MASTER AND SERVANT—A stationery clerk in a telegraph office, at a salary of 135*l*. per annum, found to be entitled to a month's notice. **VIBERT v. EASTERN TELEGRAPH CO.** . . . 17

METROPOLIS (MANAGEMENT ACTS)—A District Board of Works has no power under the Metropolis Management Act Amendment Act, 1862, if it approve of the plans and sections of sewers proposed to be constructed by a private landowner, and branched into the main system, to withhold their sanction in writing to the construction of the same until such private landowner shall pay a sum of money to the Board to cover the expenses of the Board in supervising such works. **REG. v. GREENWICH BOARD OF WORKS** 236

MISTAKE OF FACT—The doctrine that money paid under a mistake cannot be recovered back unless the mistake be one of fact, applies even

MISTAKE OF FACT—continued.

though the person receiving the payment be one of the persons authorising it to be made. *MILES v. SCOTTING* 491

MUTUAL DEALINGS—Where money has been deposited with a person for a specific purpose, which fails, it cannot, upon the bankruptcy of the depositor, be retained as a set-off by the depositary against debts due to him from the depositor. *WRIGHT v. WATSON* 171

NEGLIGENCE—Where an accident happened on a railway company's line, owing to a latent defect in a foreign truck which could not have been detected by the ordinary examination. *Held*, that as the facts proved were as consistent with the exercise of due and reasonable care as with negligence, the plaintiff must be non-suited. *GILBERT v. THE NORTH LONDON RAILWAY CO.* 31

2. — To render a lodging-house keeper liable for the wrongful acts of a servant, the lodging-house keeper must have been guilty of such a misfeasance, or such gross misconduct, as an ordinary and reasonable person would not have been guilty of. *CLENCH v. D'ARENBERG* [42]

3. — Trust property was transferred to new trustees in July, 1875. The solicitor employed in the transaction did not give certain notices necessary to perfect the title of the new trustees; and in April, 1879, a subsequent mortgagee of the property obtained priority over the trustees by giving notice of his charge. *Held*, that there was no complete cause of action against the solicitor in respect of his negligence till April, 1879, from which date the Statute of Limitations therefore ran. *BEAN v. WADE*. 519

4. — There is no duty on the part of the occupier of premises to render them secure for persons using them without invitation for their own gratification. *JEWSON v. GATTI* 564
See, too, CARRIER, 2; SOLICITOR, 3; CONTRIBUTORY NEGLIGENCE.

NOTICE OF ACTION—See VENUE.

NUISANCE—A public body was authorised by Act of Parliament to construct and maintain a system of sewers and drains, and was enabled by compulsory purchase to obtain the necessary lands for the erection of works in a specified spot for the purification of the sewage, and for the conveyance of the effluent sewage-water along a specified course terminating in a specified spot. The public body was also prohibited from allowing the sewage to be discharged into a river until after it had been subjected to a process of purification prescribed by the Act. *Held*, that so long as the public body complied with the requirements of the Act, they were not

NUISANCE—continued.

liable to an action for a nuisance in discharging the effluent into the river at the authorised place. *LEA CONSERVANCY BOARD v. THE MAYOR, &c., OF HERTFORD AND OTHERS* 299

OATH—The oath of allegiance set out in sect. 2 of 31 & 32 Vict. c. 72, cannot be taken by a person who has no belief in a Supreme Being. If, therefore, a duly elected member of Parliament who has no belief in a Supreme Being, goes through the form of taking such oath, he is none the less liable to be sued for penalties, under sect. 5 of 29 Vict. c. 19 (the Parliamentary Oaths Act, 1866), for sitting and voting without having taken the oath. The fact that a man of full age holds certain views on religious subjects at one time is *evidence* that he holds the same views four years later. *ATTORNEY-GENERAL v. BRADLAUGH* 440

PARTNERS—Where an individual has entered an appearance in an action against a firm, there must be a novation to render him liable for a debt contracted before he was a member. *CRIPPS v. TAPPIN & CO.* 13

See, too, BILL OF EXCHANGE, 5; AGREEMENT (CONCLUDED).

PART PERFORMANCE—The making of alterations in premises by the intended landlord under a verbal agreement to let. *Held* not to be a part performance, taking the case out of the Statute of Frauds. *WHITTICK v. MOZLEY* 86

PAYMENT INTO COURT—Payment of money into Court by a defendant coupled with a defence denying liability in the action, but alleging that if the liability is proved, the sum paid in is sufficient to satisfy the plaintiff's claim, is not a payment into Court by way of satisfaction or amends. Therefore, if the defendant's liability is established at the trial, the plaintiff is entitled to judgment in the action, even though the sum paid in is found to be sufficient to satisfy the plaintiff's claim. *WHEELER v. THE UNITED TELEPHONE CO.* 243

PENALTY—See PRETENDED TITLE.

PERPETUITIES (RULE AGAINST)—Where, in a deed of grant of land, there was a clause that a rent-charge should be paid by the purchaser, his heirs or assigns, to the vendor, his heirs and assigns, if the purchaser, his heirs or assigns, should at any time dig and work, &c., any mines, &c., on the property granted. *Held*, that the rent-charge was validly created, and the clause not void as violating the rule against perpetuities. An agreement to pay a sum by way of rent-charge or royalty, in respect of minerals which may be raised or obtained by, from, or out of any mine or mines, pit or pits,

PERPETUITIES (RULE AGAINST)—*continued.*

in, upon, or under the property granted, does not entitle the person in whose favour the rent-charge or royalty is created to receive payment in respect of minerals brought up at the mouth of pits upon, but not procured under, the property granted. *MORGAN v. DAVEY* . . . 114

PLEDGE—*See STOCK EXCHANGE.*

POLICE—The police have power under a warrant for the arrest of a person charged with stealing goods to take possession of the goods for the purposes of the prosecution. A person therefore is justified in refusing to hand over goods to one claiming to be the owner, if such person has been entrusted with them by the police, who have taken possession of them under such circumstances. *TYLER v. L. & S. W. RAILWAY CO.* . . . 285

PRETENCED TITLE—To render a person liable for a penalty, under 32 Hen. VIII. c. 9, s. 2, as the buyer of a pretended title to land since the statute 8 & 9 Vict. c. 106, it is necessary that the buyer should have known at the time of the sale that the title was a pretended or fictitious one. Proof that the buyer knew that the title bought was barred by the Statute of Limitations does not necessarily render the title a pretended or fictitious title within the meaning of the statute 32 Hen. VIII. c. 9, s. 2. *KENNEDY v. LYELL* . . . 584

PRINCIPAL AND AGENT—An agent employing a sub-agent, though with the knowledge of the principal, is nevertheless liable to the principal for monies received by the sub-agent. *SKINNER v. WEGUELIN EDDOWES* . . . 12

2. — Where an agent of an English firm instructed to buy goods at a foreign auction within a limited price, bought the goods by private contract before the auction at less than the limited price; it was found by the jury that this was within the scope of his authority. *STEIN v. COPE* . . . 63

3. — A sale of engravings by a cashier in the employment of a picture engraver is not a sale within the ostensible authority of the cashier. *GRAVES v. MASTERS* . . . 73

4. — There is no rule of law by which an agent professing to contract on behalf of a principal, either non-existent, or under a legal disability to contract, is to be deemed to be himself the contracting party. *HOLLMAN v. PULLIN* [254]

5. — The knowledge of the real facts required as the foundation of an election to charge the agent or the undisclosed principal must be actual knowledge. *DUNN v. NEWTON* . . . 278
See, too, BILL OF EXCHANGE, 6.

PRINCIPAL AND SURETY—A surety guaranteed payment of the premiums upon a life policy, which had been assigned by the principal debtor to his creditor to secure payment of part of the debt. Subsequently, the creditor, without the knowledge of the surety, agreed with the debtor to take the security and the liability of the debtor and surety to pay the premiums thereon in substitution for the personal liability of the debtor, in respect of that portion of the debt, and released the debtor from personal liability in respect thereof. *Held*, that this arrangement discharged the surety. *LAWES v. MAUGHAN AND FEARON* . . . 840

PRIVILEGED OCCASION—*See DEFAMATION, 1.*

PROCEEDS OF SALE—Where a person wrongfully obtained goods and sold them, and the proceeds of sale were paid into a colonial bank for the purpose of transmission to its London branch, he receiving bills of exchange to the amount of the proceeds drawn by the colonial bank on its London branch. *Held*, that the owners of the goods were entitled to follow the proceeds in the hands of the bank and to be paid the amount of the bills as bills, as they became possessed of them. *LE COMITÉ DES ASSUREURS MARITIMES v. STANDARD BANK OF SOUTH AFRICA* . . . 87

PROHIBITION—Where in an action in an inferior court, upon the facts disclosed at the trial and relied on by the plaintiff, a clear want of jurisdiction over the cause is for the first time made apparent, the defendant has a right, at any time before execution has been completed, to claim a prohibition to restrain all further proceedings, and to prohibit any further excess of jurisdiction. Prohibition will not go to an inferior court, if such court had *in fact* jurisdiction over the cause, although the facts in evidence at the trial in the inferior court were not such as to give that court jurisdiction. *HEYWORTH v. THE MAYOR, &C., OF LONDON* . . . 312

PROMISSORY NOTE—*See BILL OF EXCHANGE.*

PROOF (ONUS OF)—In an action for damages for wrongfully refusing to assign a judgment debt, the plaintiff is, *prima facie*, entitled to recover as damages the value of specific assets available for execution if under this judgment, if assigned, and it is not incumbent on him, in the first instance, to show that there were no other assets available. *ODDY v. HALLETT* . . . 532

PUBLIC HEALTH—It is reasonable for an urban sanitary authority to make a bye-law and regulations enabling it to retain the plans of intended buildings deposited under the Public Health Act, 1875, although such plans be disapproved of and rejected. *GOODING v. THE EALING LOCAL BOARD* . . . 359

See LANDLORD AND TENANT, 12.

PUBLIC POLICY—*See CONTRACT, 5.*

RECIPIENT OF GOODS, LIABILITY OF—There is no duty cast upon the recipient with respect to goods sent to him voluntarily by another, and unsolicited by the recipient. *HOWARD v. HARRIS* 253

RENT—Where a lease has been assigned, payment of a quarterly instalment by the assignee pursuant to agreement does not operate as an attornment. *HAZELDINE v. HEATON*. 40
See, too, LANDLORD AND TENANT; EXECUTORS.

ROYALTY—See PERPETUITY.

SALVAGE—See INSURANCE (MARINE), 3.

SALVAGE EXPENSES—See DAMAGES, 4.

SCHOOL BOARD, CONTRACT BY—Rule 7 of Schedule 3 of 33 & 34 Vict. c. 75 (The Elementary Education Act, 1870) provides as follows:—"The appointment of any officer of the Board may be made by a minute of the Board signed by the chairman and countersigned by the clerk (if any) of the Board, and any appointment so made shall be as valid as if it were made under the seal of the Board." The plaintiff was appointed architect to a School Board under a minute signed by the chairman of the Board, and communicated to the plaintiff by the clerk of the Board, and orders for the preparation of plans for erecting schools, and superintending their erection, were subsequently given to him by minute of the Board, properly signed and communicated to him. *Held*, that the plaintiff was an "officer" of the Board within the meaning of the above rule, and that he was entitled to recover for his services rendered, although the amount claimed was over £50, and the contract with him was not under seal. *SCOTT v. THE CLIFTON SCHOOL BOARD* 435

SEPARATE ESTATE—Where a woman married when proceedings were pending between her and others, which resulted after her marriage in a statutory debt being created. *Held*, that her separate property was chargeable with the payment of such debt. *MAYOR, &c. OF LONDON v. BROOKE* 169
See MARRIED WOMEN.

SHARE—A share in a joint-stock company is a chose in action. As between two holders of blank transfers of such shares, the one who first gives notice of his title to the Company is entitled to priority. *SOCIÉTÉ GÉNÉRALE DE PARIS v. THE TRAMWAYS UNION COMPANY* 296

SHERIFF—A sheriff is not bound to seize an equitable interest under a writ of *fi. fa.* *SCARLETT v. HANSON* 53

SHERIFF—continued.

2. — A sheriff is not liable for damage to goods which he has seized under a *fi. fa.* caused by a mob breaking in and injuring the goods, if he has used reasonable care and diligence in protecting them. *Semble*, if a sheriff is let into possession of goods, of which a receiver, appointed by the Court of Bankruptcy, is already in possession, he will not be liable in damages for not protecting the goods against third parties. *WILLIS, WINDER & Co. v. COMBE* . . . 353
See, too, INTERPLEADER, 3.

SLANDER—See DEFAMATION.

SOLICITOR—Where a solicitor, whose right hand was paralysed, had his hand guided over his name to a bill of costs by a clerk who had written the name. *Held*, a sufficient subscription of the bill to satisfy sect. 37. of the Attorneys and Solicitors Act, 1843. *ANGELL v. TRATT* [118]

2. — A solicitor may recover in respect of the items in a bill of costs which disclose the fees, charges, and disbursements with sufficient particularity, although other items in the bill are wanting in such particularity, and cannot therefore be recovered. *BLAKE v. HUMMELL* [345]

3. — A solicitor was consulted by a lessee of premises with reference to the building of a wall, to the erection of which on the demised premises his lessor objected. The lease was shown to the solicitor. The solicitor made no inquiries as to whether there was any objection to building the wall, other than what might be contained in the lease. The land was subject to a restrictive covenant against any such erection in favour of the original vendors of the freehold, and the wall, after erection, had to be pulled down. *Held*, that the solicitor had been guilty of no negligence. *PITMAN v. FRANCIS* [355]

See, too, CORPORATION.

SPECIFIC PERFORMANCE—See LANDLORD AND TENANT, 15.

STAMP—An unstamped document embodying an agreement, not falling within the exceptions specified in the Act 33 & 34 Vict. c. 97, is inadmissible in evidence in civil proceedings for any purpose whatever. *INTERLEAF PUBLISHING CO. v. PHILLIPS* 315

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STATUTORY POWERS—See NUISANCE.

STOCK EXCHANGE—A stockbroker, member of the London Stock Exchange, deposited bonds as a security for a loan with a stock and share dealer, a member of the London Stock Exchange. On the day on which such a loan is repayable, the practice is for the lender to send back the securities to the borrower in the morning, and for the borrower to send a good cheque to the lender for the amount of the loan, or else to return the securities, or other securities of equal value. The lender sent back the securities to the borrower on the morning on which the loan was repayable. *Held*, that this did not affect the lender's right to the securities, if the borrower did not give him a good cheque for the loan, or send him other securities of a value equal to that of the securities sent back. *BURRA v. RICARDO* 478
See, too, CUSTOM, 1.

SURETY—The pursuit of a counter-claim is a "proceeding continued" within the meaning of the surety's bond given in pursuance of sect. 7 of the Bankruptcy Act, 1869. A reservation by a creditor of his rights against a surety, may be by parol. *NORMAN v. BOLT* 77
See, too, BILL OF EXCHANGE, 1.

SURVEYOR—No custom exists by which surveyors engaged in compensation cases on the compulsory purchase of property are entitled to be remunerated on a percentage of the sum awarded, according to Ryde's scale. *DEBENHAM v. KING'S COLLEGE, CAMBRIDGE* 483

TENANCY—A right for directors to use a board room for certain purposes at certain times, and for a clerk to use a desk in an office for certain purposes does not constitute a tenancy. *MUNICIPAL FREEHOLD LAND COMPANY v. METROPOLITAN, &c. JOINT COMMITTEE* 184

TRADE-MARK—A. was the registered owner of a trade-mark registered in Oct. 1878, as a new trade-mark, under 38 & 39 Vict. c. 91, in respect of the goods comprised in class 5 in the 1st schedule to that Act, viz., "unwrought and

TRADE-MARK—*continued.*

partly wrought metals used in manufacture." The trade-mark consisted of a figure of Neptune, with a trident, seated on a rock in the sea, with the word "Neptune" in the background. B., in 1880, registered in respect of wire (an article comprised in class 5) a trade-mark consisting of a trident, the letters F. G., and the word "Neptune." The word "Neptune" was an essential part of A.'s trade-mark by which his goods were known in the market. B. had dealt long and largely in wire. A.'s dealings in wire were infinitesimally small. *Held*, that A.'s mark was a trade-mark, within sect. 10 of 38 & 39 Vict. c. 91; and that the word "Neptune" was an essential part of it, and that at the end of five years after the date of its registration A. acquired an indefeasible title to it, and the right to its exclusive use. **EDWARDS v. DENNIS**. 428

TRAMWAYS—*See* WRONGFUL ARREST.**ULTRA VIRES**—*See* LIVERPOOL COURT OF PASSAGE.

VENDOR AND PURCHASER—The word "shop" in a conveyance does not include a tavern. **COOMBS v. COOK**. 75

2. — A. mortgaged leaseholds by underlease to B., to secure 800*l*. A. subsequently agreed to sell the leaseholds to C. for 900*l*. C. paid a deposit of 30*l*., and agreed to pay the balance of the purchase-money payable on a given day. By the agreement 800*l*. of the purchase-money was to be left on mortgage of the property sold. The same solicitors acted for A., B., and C., throughout the matter. A. executed an assignment of the leaseholds to C., and C. entered into possession thereof. *Held*, that A. was entitled to the 70*l*. balance of purchase-money from C., although no sur-render had been obtained of B.'s underlease. **OWENS v. SHIELD**. 356

3. — Where the same vendor selling to several persons plots of land parts of a larger property, exacts from each of them covenants imposing restrictions on the use of the plots sold without putting himself under any corresponding obligation, it is a question of fact whether the restrictions are merely matter of agreement between the vendor himself and his vendees, imposed for his own benefit and protection, or are meant by him and understood by the buyers to be for the common advantage of the several purchasers. In the former case purchasers of other plots of land from the vendor cannot claim to take advantage of them. In the latter, such

VENDOR AND PURCHASER—*continued.*

purchasers and their assigns may enforce them *inter se* for their own benefit; and where a vendor desires to sell at an auction the whole of his property, the inference is strong that such covenants are for the common benefit of the purchasers. A. sold to B. land subject to restrictive covenants, which would have been enforceable against B., if he had completed the purchase, by purchasers of other plots. A. knew of some of these restrictions, and had the means of knowing all. The land was sold under conditions of sale, providing: (1) That the property was sold subject to any matter or thing affecting the same, whether disclosed at the time of sale or not. (2) That any error or omission in the particulars, or these special conditions, should not annul the sale, or entitle the purchasers to compensation. The conditions of sale did not refer to the restrictive covenants. *Held*, that B. was not precluded by the conditions of sale from repudiating the contract, and that sect. 3, sub-sect. 3 of the Conveyancing Act, 1881, had not altered the law in this respect. **NOTTINGHAM BRICK CO. v. BUTLER**. 565

VENUE—The provisions of the Highways Act, 1835, s. 109, as to local venue are abolished by the Rules of Court, 1875, Order 36, Rule 1. The provisions of the above section as to notice of action do not apply where the principal object of the action is an injunction. **PHELPS v. THE HADHAM DISTRICT BOARD**. 67

WARRANTY OF TITLE—The Government of the United States in 1865 issued bonds payable to bearer, redeemable at the pleasure of the Government, after 1870, and payable, at all events, in 1885. When the Government wished to redeem any of these bonds, they gave notice to holders by public notification that they would be paid on presentation. After such notice, the bonds notified were called "Called Bonds." These bonds are dealt in in England for the purpose of making remittances to America. The course of business is for the seller to supply the buyer with bonds or coupons of railway companies, &c., payable in America at an agreed price, no particular bonds or coupons being specified. It was proved that whenever default was made in payment of the coupons in America, the seller returned the money paid for them, but no evidence was given of any case in which payment of a bond had been refused. A. sold to B. in accordance with the above course of business certain "Called Bonds," which had been originally stolen from American holders, and payment to B. of the bonds was refused by the American Government. *Held*, that there was an implied warranty of title on the sale by A. to B., and that B. was entitled to recover from A. the price paid. **RAPHAEL v. BURT**. 325

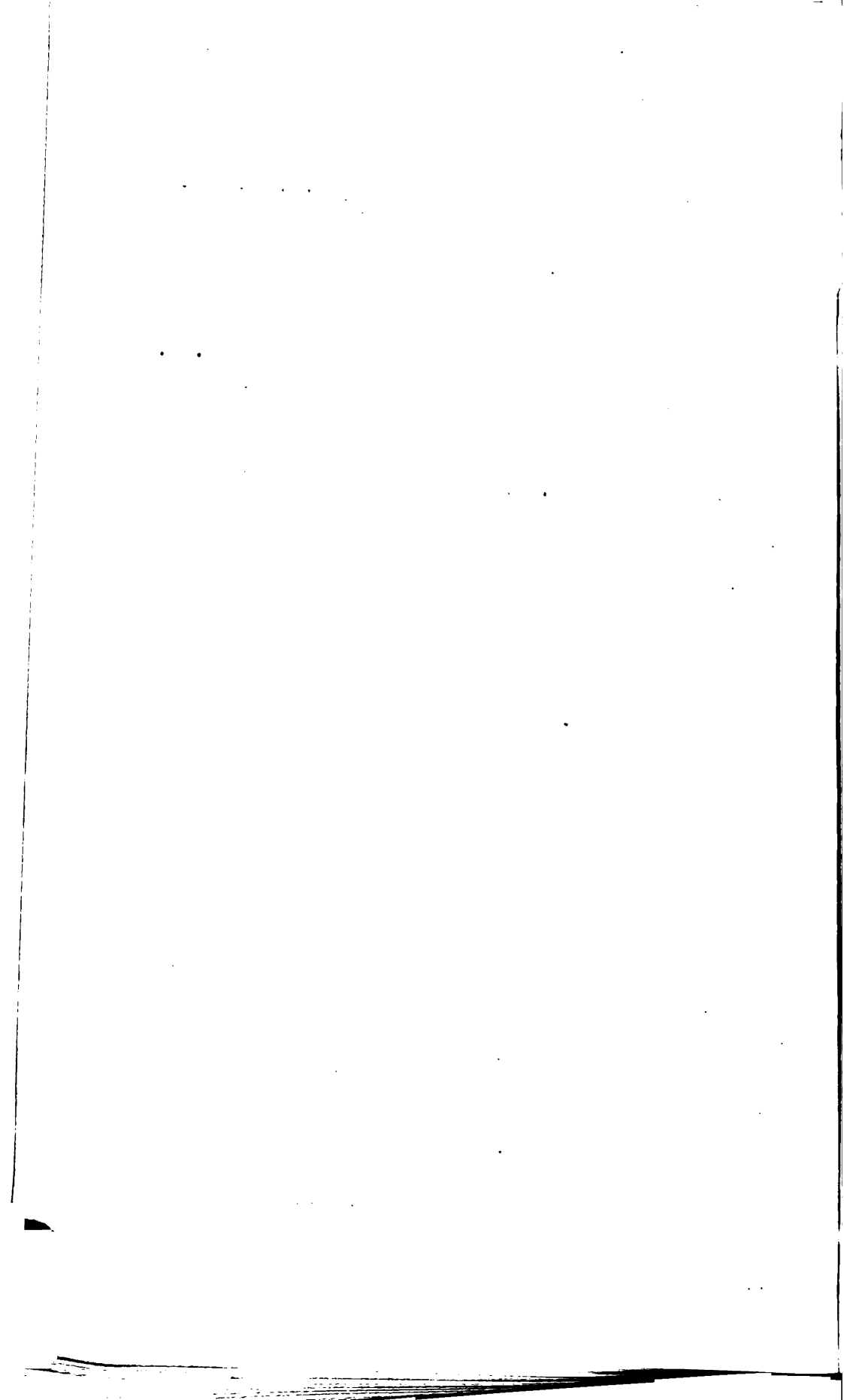
WATERWORKS—Where a dispute has arisen as to the amount of the water-rate payable by an occupier of premises to a water company (whose special Act incorporated the Waterworks Clauses Act, 1847), the determination of the annual value of the premises supplied, by two justices, under sect. 68 of the Act of 1847, is a condition precedent to the right of the occupier to sue the company for cutting off the water, and for the amount alleged to have been paid in excess. *WHITING v. EAST LONDON WATERWORKS CO.* [331

WILL—Where a witness in fact attested a testator's signature, but the form of attestation described him as only attesting the signatures of two other attesting witnesses (the attestation of one of whom was insufficient), probate of the will granted. *MASON v. BISHOP* . . . 21

WRONGFUL ARREST—A conductor of a tram-car gave into custody a passenger who tendered him a half-sovereign in payment of his fare, wrongfully thinking it a bad one. Sects. 51 and 52 of the Tramways Act (33 & 34 Vict. c. 78), empowers officers or servants of the promoters, or lessees, of any tramway, to seize and detain any person seeking to avoid payment of his fare. *Held*, that the company were liable for the wrongful act of the conductor. *FURLONG v. SOUTH LONDON TRAMWAYS CO.* . . . 316

WRONGFUL DISMISSAL—*See* MASTER AND SERVANT.

THE END.



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